TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 443

RAY CONSOLIDATED COPPER COMPANY, APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

FILED JUNE 12, 1934

(30,408)

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INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 15, 1924

[fol. 1] **IN COURT OF CLAIMS OF THE UNITED STATES**

No. B-160

RAY CONSOLIDATED COPPER COMPANY, a Corporation,

vs.

THE UNITED STATES.

I. PETITION AND AMENDED PETITION

On August 2, 1922, the plaintiff filed its original petition.

Subsequently, to wit, on November 19, 1923, by leave of court, the plaintiff filed its amended petition. Said amended petition is as follows:

II. AMENDED PETITION—Filed November 19, 1923

To the Court of Claims of the United States and to the Honorable the Judges thereof:

The above named claimant, by Root, Clark, Buckner & Howland, its attorneys, by this, its petition, respectfully shows:

1. The claimant at all times hereinafter mentioned was and is a domestic corporation organized and existing under the laws of the State of Maine, engaged in the business of mining, and having an office at 25 Broad Street, Borough of Manhattan, in the City of New York, New York.

2. The claimant has a just claim for the refund of $21,240.30 as the still unreturned portion of a larger sum paid by it on June 5, 1922, under duress and written protest, to the Collector of Internal [fol. 2] Revenue for the Second New York District at New York City, New York, as an additional capital stock tax wrongfully assessed by the Commissioner of Internal Revenue of the United States for the period ending June 30, 1921, with interest thereon. The total amount so originally assessed and paid was $69,798.07, of which $48,447.77 was subsequently refunded by the United States. The provision of law under which such wrongful assessment was made and upon which the petitioner claims such refund is Section 1000 of Title X of the Act of February 24, 1919, entitled "An Act to Provide Revenue and for other Purposes" and known as the Revenue Act of 1918.

3. Pursuant to Section 3173 Revised Statutes and other Acts of Congress provided, the claimant, on July 30, 1920, and on Official Form 707, made to the Commissioner of Internal Revenue its return for the year ending June 30, 1921, for the special tax imposed by Section 1000, Title X, of the Revenue Act of 1918. Said return

showed that the fair average value of its capital stock for the preceding year ending June 30, 1920, was $34,803,608.99, and that the tax due thereon was $34,798.

4. The special tax leviable upon a domestic corporation under said Section 1000, Title X, was measured by "the fair average value of its capital stock for the preceding year ending June 30th." The capital stock of petitioner was all common stock. On December 31, 1919, there were outstanding 1,577,179 shares thereof, having a par value of $10 per share.

Said stock was at all of said times listed on the New York Stock [fol. 3] Exchange. During each year, including 1919 and 1920, there were a large number of sales of such stock on said Exchange. During the calendar year 1919, 537,938 shares of such stock were bought and sold in bona fide transactions upon the New York Stock Exchange, such transactions occurring in practically every business day. The average of the twelve monthly mean prices realized on such sales and purchases in each of the twelve months of the year 1919 was $22.067 per share.

5. The value ($34,803,608.99) so reported by the claimant in its return on said Official Form 707 as the fair average value of its capital stock was determined in conformity with the instructions of the Commissioner of Internal Revenue contained in said Official Form 707, as of the fiscal year ending December 31, 1919. It was determined by multiplying the number of shares outstanding during said fiscal year, the calendar year 1919, by the average market price per share during 1919, and was based directly upon said sales and purchases during that year, and such value was the fair average value of the capital stock of the claimant for the fiscal year preceding June 30, 1920.

6. Upon said return, a special tax was assessed against claimant under said Section 1000, Title X, in the sum of $34,798. The claimant duly paid that tax.

7. On February 23, 1922, the Commissioner of Internal Revenue notified the claimant that an additional assessment of capital stock tax, amounting to $69,107, would be listed against it for the year [fol. 4] ending June 30, 1921, and that such assessment was arrived at by taking as the "fair average value" of the capital stock of the claimant the alleged value of the corporate assets, including in such alleged value as the value of the mining property of the claimant the fair market value of such property on March 1, 1913, as determined for depletion purposes under the Revenue Acts of 1916 and 1917 by the Commissioner of Internal Revenue, with allowance for depletion sustained after March 1, 1913.

8. Following such notice and on March 28, 1922, the said collector made demand upon claimant for the payment of $69,107 as an additional capital stock tax for the year ending June 30, 1921. In assessing such additional tax, the Commissioner of Internal Revenue determined that the fair value of the claimant's capital stock, on the

basis so used by him, was $103,910,409.07. That value was determined without regard to the value of the claimant's capital stock as evidenced by said market transactions hereinabove set forth.

For the reasons hereinbefore set forth, such valuation of $103,910,000 was erroneous, against the requirements of said Section 1000, and excessive; as for like reasons was also said assessment of additional capital stock tax in the sum of $69,107.

9. On April 6, 1922, the claimant, pursuant to Section 1316 of said Revenue Act of 1918, amending Section 3220 of the Revised Statutes, and pursuant to other acts of Congress provided, duly filed [fol. 5] with the said Collector a claim for abatement of said additional assessment of capital stock tax, amounting to $69,107. Such claim for abatement was rejected by the Commissioner of Internal Revenue under date of May 27, 1922.

10. On June 2, 1922, the said Collector made a second demand for the payment of said additional assessment of capital stock tax for the year ending June 30, 1921, amounting to $69,107, and also made demand for interest on said sum at the rate of 1% per month for one month, amounting to $691.07. On June 5, 1922, the claimant, under threat by the said Collector of seizure and sale of its property if it failed to make such payments and in the belief that such threat would be carried out, paid to the said Collector at New York City, New York, the said sums of $69,107 and $691.07. The total sum so paid was $69,798.07. Said payments were made under duress and protest and, at the time of making such payments, the claimant filed with the said Collector a written protest against such additional assessment and against the payment thereof and of interest thereon. A copy of such protest, marked Exhibit "A," is hereto attached and made a part hereof.

11. On information and belief, the claimant avers that the total sum of $69,798.07 so paid by it under protest to the said Collector was thereafter by him turned over and deposited into the Treasury of the United States of America as in the usual course of his official business.

12. On June 14, 1922, pursuant to the acts of Congress referred to [fol. 6] in Paragraph 9 hereof, the claimant duly filed with the said Collector a claim for refund of said payment. A copy of such claim for refund, hereto attached and marked Exhibit "B," is made a part of this petition. On June 29, 1922, such claim for refund was rejected in full by the Commissioner of Internal Revenue.

13. On November 9, 1923 the claimant received a written "notice of adjustment of claim for refund" signed by a Deputy Commissioner of Internal Revenue stating that its said claim for refund of $69,798.07 had been reconsidered and that $48,557.77 thereof had been allowed and $21,240.30 thereof again rejected. On November 9, 1923 the claimant received a check for said amount of $48,557.77 together with interest thereon amounting to $1,245.87. Said notice stated that the refund was based upon an estimate that the value of

the physical property of the claimant as of December 31, 1919 was $32,282,993.56 and that by substituting this valuation for the valuation previously used in determining the additional tax, the total value of the assets exceeded the liabilities by $55,833,541.66. This amount was adopted as the "fair value of capital stock" and a refund of $48,077 of the additional tax with $480.70 interest paid thereon was approved.

14. By reason of said refund the amount, the recovery of which is sought by the claimant in this petition, was reduced to $21,240.30. The whole of said sum of $21,240.30 is now wrongfully and unlawfully retained and withheld from the claimant without its consent and against its will by the United States of America.

[fol. 7] 15. No other action than as aforesaid has been had on this claim in Congress or by any of the Departments. The claimant has at all times borne true allegiance to the Government of the United States. It has not in any way voluntarily aided, abetted, or given encouragement to rebellion against such Government. It is and always has been the sole and absolute owner of the claim here presented. It has made no transfer or assignment of said claim or of any part thereof or of any interest therein. It is justly entitled to the amount claimed from the United States of America, after allowing all just credits and setoffs.

16. The claimant believes the facts as herein above stated to be true.

Wherefore, the claimant prays judgment against the United States of America upon the facts and law for $21,240.30, together with interest thereon from June 5, 1922 and its reasonable costs and disbursements herein.

Ray Consolidated Copper Company, Claimant, by Sherwood Aldrich, As Its President. Root, Clark, Buckner & Howland, Attorneys for Claimant.

Office and Post Office Address, No. 31 Nassau Street, Borough of Manhattan, City of New York, New York.

[fol. 8] Jurat showing the foregoing was duly sworn to by Sherwood Aldrich omitted in printing.

[fol. 9] EXHIBIT "A" TO PETITION

June 5, 1922.

To the Hon. Andrew W. Mellon, Secretary of the Treasury, the Hon D. H. Blair, Commissioner of Internal Revenue, and the Hon. Frank K. Bowers, Collector of Internal Revenue for the Second District of New York:

SIRS: Under date of March 28, 1922, Honorable Frank K. Bowers, Collector of Internal Revenue for the Second District of New York,

sent to Ray Consolidated Copper Company, a notice and demand for payment of $69,107 additional capital stock tax for the twelve month period ending June 30, 1921. Within ten days from March 28, 1922, Ray Consolidated Copper Company duly filed a bona fide claim for the abatement of said assessment, which was accepted by said Collector. Under date of May 27, 1922, said Company was duly notified by the Commissioner of Internal Revenue of the rejection of said claim for abatement. On June 2, 1922, said Company received the enclosed second notice and demand for tax on form 1-21, demanding payment of said tax of $69,107 within ten days, together with interest thereon at the rate of 1% per month beginning April 7, 1922, one month's interest being $691.07.

Pursuant to said enclosed second notice and demand received from said Collector, the undersigned, Ray Consolidated Copper Company, herewith under duress and with protest, and to avoid threat-
[fol. 10] ened penalties and threatened seizure of its property, makes payment to said Collector of the sum of $69,107, heretofore and now represented by him to be lawfully required and demanded of said corporation and to be due to the United States under and in accordance with Section 1000 of Title X of the Revenue Act of 1918, being the Act of Congress approved February 24, 1919, as a tax upon or in respect of the fair average value of the capital stock of said Company for the year ending June 30, 1921, and to have been lawfully assessed against said corporation as such tax, together with interest thereon for one month at the rate of one per cent per month, amounting to $691.07, as demanded by said second notice and demand.

Said payment is made under protest and duress:

(1) Said corporation herby protests against being required to pay said sum and each and every part thereof, on the ground that the same has been erroneously and illegally assessed, and that the demand for such payment and the enforcement thereof are invalid and unlawful and not warranted by any valid statute, and deprive the undersigned of rights secured to it by the Constitution and laws of the United States.

Without in any way limiting said general protest, further protest against the assessment and against the demand for the payment of said tax and the enforcement thereof is hereby made upon the following grounds:

(2) The undersigned protests that said additional assessment and said demand for payment of said tax are erroneous and unlaw-
[fol. 11] ful in that they are based upon a misinterpretation and misappli-cation of Section 1000 of Title X of the Revenue Act of 1918. That Section provides in part:

"(a) That on and after July 1, 1918, in lieu of the tax imposed by the first subdivision of Section 407 of the Revenue Act of 1916—

(1) Every domestic corporation shall pay annually a special excise tax with respect to carrying on or doing business, equivalent

to $1 for each $1,000 of so much of the fair average value of its capital stock for the preceding year ending June thirtieth as is in excess of $5,000. In estimating the value of capital stock, the surplus and undivided profits shall be included; * * *"

By the provisions of this Section, the tax imposed is measured by the aggregate value of the shares of stock of the corporation. Such value may be established by proof of sales of such shares in reasonable volume during the preceding year. The undersigned has heretofore duly filed a return on official form 707 for the taxable period ending June 30, 1921, setting forth the aggregate fair average value of its shares of stock, such value being established by a large number of bona fide sales of such stock, and has heretofore duly paid the capital stock tax upon such fair average value. Applying the basis prescribed by the statute, no further tax for the period ending June 30, 1921, is legally due from the undersigned.

The Commissioner of Internal Revenue, however, has construed the statutory language quoted above to mean that the capital stock tax upon mining companies under said Section 1000 should be based upon a valuation of the net assets of such corporations rather than upon a valuation of the shares of stock of such corpora-
[fol. 12] tions. Said Commissioner has heretofore notified this Company that the additional tax now demanded was determined by him to be due by measuring the total tax due for such period by the net fair value of the assets of said corporation. (Letter to Ray Consolidated Copper Company, dated February 23, 1922, signed by McKenzie Moss, Deputy Commissioner, containing symbols CST—2 N. Y.—46—NNM). Such additional tax and each and every part thereof is therefore based wholly upon a misinterpretation and misapplication of Section 1000 of Title X of the Revenue Act of 1918, and is therefore erroneous and unlawful and is not warranted by the language of said statute.

(3) The undersigned protests that said assessment is erroneous and unlawful in that Section 1000 of Title X of the Revenue Act of 1918, as interpreted and applied by the Commissioner of Internal Revenue in this case, is unconstitutional. Said Section provides in part as follows:

"That on and after July 1, 1918, in lieu of the tax imposed by the first subdivision of Section 407 of the Revenue Act of 1916—

(1) Every domestic corporation shall pay annually a special excise tax with respect to carrying on or doing business, equivalent to $1 for each $1,000 of so much of the fair average value of its capital stock for the preceding year ending June thirtieth, as is in excess of $5,000. In estimating the value of capital stock, the surplus and undivided profits shall be included; * * *"

In applying said statute in this case, the said Commissioner of Internal Revenue has assessed a tax against the undersigned based
[fol. 13] upon a valuation of its net assets. Such a tax is a direct

[fol. 14]

EXHIBIT "B" TO PETITION

Treasury Department
Internal Revenue Service
Form 843—Jan., 1922
Comptroller General U. S.
January 18, 1922

Claim for

☐ Abatement of tax assessed

☐ Credit against outstanding assessments

☐ Refund of taxes illegally collected

☐ Refund of amounts paid for stamps used in error or excess

Collector's Notation
District
Account number
Date received Stamp here
Collector of Internal Revenue

Important

File with Collector of Internal Revenue where assessment was made. Not acceptable unless completely filled in.

Notice to Collector

Collector must indicate in block above the kind of claim, except in Income Tax cases.

Date received by Administrative Unit

Stamp here

STATE OF NEW YORK,
County of New York, } ss:

Type or Print

Ray Consolidated Copper Company,
(Name of taxpayer or purchaser of stamps.)
25 Broad Street,
(Residence—give street and number as well as city or town and State.)
New York City, N. Y.
(Business address.)

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

1. Business in which engaged: Mining.

2. Character of assessment or tax. Additional Capital Stock Tax
(State for or upon what the tax was assessed or the stamps affixed.)

Period	Year
From: July 1,	1920
To: June 30,	1921

3. Amount of assessment or stamps purchased, $69,107 as tax; $691.07 interest..... $69,798.07

4. Reduction of Tax Liability requested (Income and Profits Tax) .....

5. Amount to be abated.....

6. Amount to be refunded (or such greater amount as is legally refundable) with interest from June 5, 1922..... $69,798.07

7. Dates of payment (See Collector's receipts or indorsements of canceled checks) June 5, 1922
(If statement covers income tax liability, items 8-11, inclusive, must be answered.)

8. District in which return (if any) was filed. Second District, New York.

9. District in which unpaid assessment appears.....

10. Amount of overpayment claimed as credit..... $.....

11. Unpaid assessment against which credit is asked; period from.....to..... $.....

Deponent verily believes that this application should be allowed for the following reasons:

[See attached statement.]

(Attach additional sheets if necessary.)

Sworn to and subscribed before me this 14th day of June, 1922. Signed:

[Notarial Seal.]

R. B. HINDLE,
Notary Public, etc.
(Title.)

C. V. JENKINS,
Asst. Treasurer
Ray Consolidated Copper Co.

(This affidavit may be sworn to before a Deputy Collector of Internal Revenue or Revenue Agent without charge.)

tax upon the real and personal property of this corporation within the meaning of Article X, Section 9 of the Constitution of the United States, and is therefore unconstitutional and invalid because not laid in proportion to population as required by that Section.

(4) The undersigned hereby protests against being required to pay the said sum of $69,798.07, and each and every part thereof, and represents and declares that such payment is made under duress and only to avoid penalties and forfeitures, the enforcement of which has been and is now threatened by representatives of the United States, and the seizure of its property which is now threatened by representatives of the United States. And notice is hereby given that at such time and in such manner as may be found advisable, appropriate proceedings, including any action at law or in equity that may be deemed suitable, will be taken to recover the said sum of $69,798.07, or any part thereof, and to preserve and protect all the rights and interests of said corporation.

Dated, New York, N. Y., June 5, 1922.

Ray Consolidated Copper Company, by C. V. Jenkins, Assistant Treasurer.

(Here follows Exhibit "B" to Petition, marked side folio page 14)

[fol. 15] Refund is claimed of $69,798.07 paid (as set forth in the Company's letter of June 5, 1922, to which reference is hereby made) by Ray Consolidated Copper Company under protest and duress on June 5, 1922, as additional capital stock tax for the period ending June 30, 1921, together with interest.

Facts

Ray Consolidated Copper Company is a domestic corporation engaged in mining copper. On or about July 31, 1920, it filed its capital stock tax return on official Form 707, showing that the fair average value of its capital stock for the preceding year ended June 30th, 1920, as demonstrated by bona fide sales of its shares of stock in large volume was $34,803,608.99. Thereafter Ray Consolidated Copper Company duly paid the tax of $34,798, based upon that valuation. The Company had outstanding on December 31, 1919, 1,577,179 shares of common stock with a par value of $10 per share, making an aggregate par value of $15,771,790. This stock for many years has been listed on the New York and Boston Stock Exchanges and a large amount of stock has been bought and sold during each year. During 1919, 537,938 shares of the Company's stock were bought and sold on the New York Stock Exchange. The value of $34,803,608.99 reported by the Company was based upon actual sales of such stock made on the New York Stock Exchange during 1919 at an average price of $22.0677 per share. These sales were set forth in detail in Exhibit B of Form 707.

On February 23, 1922, the Commissioner of Internal Revenue [fol. 16] notified the Company that an additional assessment of capital stock tax, amounting to $69,107, would be made against it for the year ended June 30, 1921, and that this assessment was determined by basing the capital stock tax of claimant upon a valuation of the corporate assets, using as the value of the mining property the fair market value of such property on March 1, 1913, as determined for depletion purposes by the Commissioner of Internal Revenue, with allowance for depletion sustained. Demand for payment of this additional tax was made on March 28, 1922, a claim for abatement was duly filed within ten days and was rejected by the Commissioner under date of May 27, 1922. The additional assessment was thereupon duly paid under protest, with interest, on June 5, 1922.

Printed and typewritten briefs have heretofore been filed with the Bureau of Internal Revenue opposing the assessment of capital stock tax on the basis of such a valuation of the assets of the Company, to which reference is made for a full statement of taxpayer's position.

The Statute

Section 1000 of the Revenue Act of 1918 reads, in part, as follows:

"That on and after July 1, 1918, in lieu of the tax imposed by the first subdivision of Section 407 of the Revenue Act of 1916—

(1) Every domestic corporation shall pay annually a special excise tax with respect to carrying on or doing business, equivalent to $1 for each $1,000 of so much of the fair average value of its capital stock for the preceding year ending June 30, as is in excess of [fol. 17] $5,000. In estimating the value of capital stock, the surplus and undivided profits shall be included;

(2) Every foreign corporation shall pay annually a special excise tax with respect to carrying on or doing business in the United States, equivalent to $1 for each $1,000 of the average amount of capital employed in the transaction of its business in the United States during the preceding year ending June 30."

The Commissioner's Ruling

In making this additional assessment the Commissioner has based the capital stock tax upon a valuation of the assets of the corporation and has used as the value of the Company's mining property the fair market value of such property as of March 1, 1913, as determined by the Income Tax Unit. The Commissioner's letter states:

"You contend that the fair value of your capital stock is represented by the average prices on shares of stock established through market trading, whereas this office holds that, in the case of your Company, the fair value of the capital stock considered as a whole is not materially less than the net fair value of the assets. By using the values established for depletion purposes in connection

with Federal taxes, the net worth reflected by the excess of assets over liabilities is $103,910,000, which is considered indicative of the fair value of the capital stock for the purpose of this tax. It is understood you contended for a valuation of the mineral land as of March 1, 1913, less depletion sustained, equal to or in excess of the values used in the above computation. Furthermore, it is not shown that there has been any material change from such value."

[fol. 18] Position of the Company

The Company contends that (1) the term "fair average value of * * * capital stock" means fair average value of the aggregate shares of stock and not the value of the corporate assets; and that (2) the amount of the tax is to be ascertained by valuing the shares in the same manner in which shares are valued by the Department in other connections, the evidence of value preferred being the record of representative sales of shares when available; and that (3) in the case of a mining company the value of its mining property, determined as of an earlier date for depletion deduction, bears no necessary or fixed relation to the average present value of its shares of stock.

This position is more fully developed by the proposition stated below.

I

The shares of capital stock of a corporation and the assets of the corporation are entirely different things.

The simple distinction between the assets of a corporation and the shares of capital stock is well settled by court decisions. The courts recognize that these things have different values and the Department has adopted this principle in valuing assets for depletion purposes. For capital stock tax purposes, however, the Department apparently asserts the right to base the capital stock tax in any particular case either upon asset values or upon share values, whichever may be higher. It is clear that the use of one or the other [fol. 19] of these two different things must be held to be the basis of this tax and that the same words in the same statute cannot be treated as meaning two different things. The Department must in all cases value the same thing. Under this statute, it is clear that the tax is based on share values.

II

"Capital Stock" as used in Section 1000 means shares of stock.

It is clear from court decisions that in any particular case the meaning of the words "capital stock" is determined by the context.

A. The language of the statute shows that share value is intended.

The words "capital stock" in Subdivision 1 of Section 1000 must be contrasted with the words "capital employed" used in Subdivision 2. Both phrases do not mean corporate assets. The first means shares, the latter assets. Share values can be averaged, as the statute requires; assets values ordinarily cannot be averaged. A valuation of shares gives full effect to the sentence—

"In estimating the value of capital stock the surplus and undivided profits shall be included."

Such a valuation is "estimated," since it requires an exercise of judgment, and it gives full effect and consideration to surplus and undivided profits. A valuation of assets, including unrealized appreciation, is not based upon surplus and undivided profits, for they do [fol. 20] not include such appreciation. The fact that the value must be estimated is no indication that the statute must be construed so as to make the estimate as difficult as possible.

B. The history of the statute shows that it was not the intention of Congress to base this tax upon asset values.

In the Congressional debate upon the 1916 Act, containing the first capital stock tax, it was expressly stated that the tax was based on the market value of stocks. The Congress which adopted the Revenue Act of 1918 specifically refused to approve a Senate amendment changing the basis of the tax from "capital stock" to "net assets." The same Congress in this same Act refused to adopt a valuation of assets as the basis for invested capital (the basis of the important excess profits tax), because it regarded such a valuation of all corporate property as impracticable and impossible. It is clear Congress did not intend to require such a valuation of assets as the basis for the much less important capital stock tax.

Central Union Trust Co. vs. Edwards (unreported, U. S. D. C., So. Dist. N. Y.).

C. Measured by the value of shares of stock the capital stock tax is constitutional; measured by the value of assets it is unconstitutional.

A tax on corporate assets, while other assets are not taxed, is discriminatory, unequal and not based upon any reasonable classification, and hence takes property without due process of law. A tax upon corporate assets is a direct tax and constitutional only if [fol. 21] levied according to population and apportioned among the several states. This statute, as applied by the Commissioner, is, therefore, unconstitutional.

An excise tax measured by the value of shares of stock, a distinctive corporate attribute, is constitutional. A statute is always construed, if possible, so as to avoid raising constitutional questions, or in favor of rather than against its constitutionality.

D. The manifest intent of Congress was to adopt a measure of the capital stock tax which was readily ascertainable. The words "capital stock" should therefore be held to refer to shares rather than to assets, because shares are often bought and sold and can be satisfactorily valued far more readily than corporate assets, which are seldom bought and sold.

Shares of stock are far easier to value than corporate assets, because shares of representative corporations are regularly and frequently bought and sold in large numbers and can, therefore, be valued with relative ease and certainty. Corporate assets, however, are rarely dealt in and any correct annual valuation of all corporate assets is impracticable, if not impossible. The fact that judgment must be used in "estimating" value is no indication that the statute requires the exceedingly difficult valuation of assets to be made rather than the relatively simple valuation of shares. Congress intended to adopt a measure of the tax which was readily ascertainable by the taxpayer and by the Government. A correct valuation of all corporate assets annually or oftener would be impracticable and the expense of attempting to make and check such a valuation would be prohibitive.

[fol. 22] III

The primary method for determining share value is by market transactions.

Once it is determined that the value of the shares of the corporation is the thing to be ascertained, the valuation is a relatively easy task. In other connections the Department holds that market quotations of sales of stock regularly bought and sold on the market are ordinarily the best evidence obtainable of its value. In a case such as this where a large volume of the Company's stock was freely bought and sold on the New York Stock Exchange during the year ending June 30, 1920, such sales are the best evidence of value and satisfactorily establish the fair average value of the shares of stock. Any valuation of the mineral property of the corporation as of March 1, 1913, has little bearing on the value of the shares of stock in 1920.

Refund of the additional assessment and interest, amounting to $69,798.07, is, therefore, claimed for the reason that the statutory measure of the capital stock tax is a valuation of corporate shares rather than corporate assets; that the fair average value of the shares of this Company, based upon bona fide sales of its stock in reasonable volume, was correctly stated on its return and should not be modified by any consideration of 1913 asset value; that a capital stock tax measured by a valuation of corporate assets is unconstitutional as discriminatory and as an unapportioned direct tax; and that the entire additional assessment was erroneous and unlawful.

[fol. 23] III. General Traverse

No demurrer, plea, answer, counterclaim, set off, claim of damages, demand, or defense in the premises, having been entered on the part

of the defendant, a general traverse is entered as provided by Rule 34.

IV. Argument and Submission of Case

On April 9, 1924, this case was argued and submitted on merits by Messrs. William Wallace, Jr., and Arthur A. Ballantine, for plaintiff, and by Messrs. Fred K. Dyar and Forest D. Siefkin, for the defendant.

[fol. 24] **V. Findings of Fact, Conclusion of Law, and Opinion of the Court by Booth, J.**—Entered May 19, 1924

This case having been submitted to the court upon a stipulation of facts signed by Root, Clark, Buckner, and Howland, attorneys for plaintiff, on behalf of plaintiff, and Robert H. Lovett, Assistant Attorney General, on behalf of the United States, the court, upon said stipulation, makes the following

Findings of Fact

I

The Ray Consolidated Copper Company, the plaintiff herein, is, and at all times mentioned in the petition herein was, a domestic corporation organized and existing under the laws of the State of Maine, engaged in the business of mining and having an office at 25 Broad Street, borough of Manhattan, in the city and State of New York.

II

Plaintiff was incorporated on May 14, 1907, for the purpose of conducting general mining, milling and smelting operations. During 1919 and prior years, plaintiff owned, and still owns, together with other properties, mining lands near Ray, Ariz., consisting of 126 patented mining claims containing 2,143 acres, which mining lands and claims were acquired prior to March 1, 1913. These ore bodies occur in what is known as a blanket formation; that is to say, the ore is found in a horizontal zone, somewhat irregular on its upper and lower boundaries, but is distinguished from veins or lodes in that it does not extend at an angle and to great depths into the earth. The particular character of this deposit renders it susceptible of accurate measurement as to its extent, and its metal contents capable of definite ascertainment. The property was explored very thoroughly by the plaintiff, beginning in 1907, by what are known as "churn drills." In exploring its ore deposit, plaintiff caused to be drilled at corners of 200-foot squares a total of 353 drill holes covering an area of something in excess of 183 acres, the total amount of drilling aggregating 147,449 feet, or approximately 27 miles; the

average depth of these holes was 417 feet. The drilling was continued until the exterior limits of the ore deposits were reached [fol. 25] laterally and the holes showed no ore of commercial value. Of the holes thus drilled 277 showed ore of commercial value—the average depth of these holes being 440 feet and the average thickness of the ore 101 feet. The diameter of the holes drilled averaged about eight inches. The rock thus removed from the holes in the course of drilling was carefully sampled and assayed so that the grade of ore was definitely determined and the tonnage and metallic content was susceptible of mathematical determination.

After the extent and grade of the ore bodies were determined, the property was developed by shafts and drifts on a very elaborate scale and the actual mining of the ore has demonstrated the accurcy of the sampling of the drill holes as originally made. The outstanding characteristic of these porphyry copper mines is precisely that their ore bodies are well ascertained; and that this is the outstanding characteristic is well known to the mining world. The property was fully equipped by the construction of a concentrating plant with a capacity of 12,500 tons per day. The exploration of this property had proceeded before March 1, 1913, to such an extent that the minimum tonnage, or cubical contents, of ore, and the copper content per unit of ore, were at that time known to the management of the company. The property was not fully explored on March 1, 1913, and there was a strong probability of further ore contents, which probability has since been turned into a certainty, and there is even yet a probable ore tonnage not now taken into account. The minimum quantities were determined with an accuracy and certitude that do not require verification, but subsequent mining operations have fully verified it. During 1919, 1920, and prior years, this mining property was actively operated by plaintiff and a large amount of copper was mined, smelted, and sold. On December 31, 1919, large reserves of unmined ore had been developed, as before stated, and were known to exist.

III

In the year 1918 the plaintiff submitted to the Commissioner of the Internal Revenue a statement as to the value of its mineral property on March 1, 1913 (upon which depletion deductions for income tax purposes were to be based) as follows:

"Ray Consolidated Copper Company—Memorandum as to Depletion Allowance for Income Tax Returns Pursuant to Treasury Decision No. 2446

"The mining property of this company is owned in fee and was acquired prior to March 1, 1913.

"The method by which the value of the property as of March 1, 1913, was determined is as follows:

1a.	The gross copper contents of the mine as of December 31, 1916, was estimated by the company's engineers at.....	3,798,422,834 lbs.
1b.	To the foregoing was added the gross copper contents of the ore mined from March 1, 1913, to December 31, 1916, or.....	362,769,548 "
2.	Making the total gross copper contents, as of March 1, 1913.....	4,161,192,382 lbs.

[fol. 26]

3.	The life of the mine from March 1, 1913, is estimated at 24.29 years. This is based on the period elapsed from March 1, 1913, to December 31, 1916, 3.83 years plus 20.46 years, being the time which will be required to deplete the above number of pounds of copper based on a daily production of 12,500 tons.....	24.29 yrs.
4a.	The net copper contents of the ore mined to December 31, 1916, was.....	236,980,583 lbs.
4b.	The net copper contents of the balance of the ore in the mine estimated upon an extraction of 78.048%.....	2,964,599,926 "
5.	Making a total net copper contents as of March 1, 1913.....	3,201,580,509 lbs.
6.	The selling price of copper during the life of the mine was based on the average price of copper for the 10 years ending December 31, 1916, which was.....	16.6739 c. per lb.
7.	The cost of production over the remaining life of the mine is estimated at.....	7.7181 c. per lb.
8.	The estimated net value per lb. of copper, using the foregoing selling price and cost of production, is.....	8.9558 c. per lb.
9a.	The value in the mine as of March 1, 1913, of 236,980,583(4) lbs. of copper mined during the 3 years and 10 months ending December 31, 1916, allowing for interest at the rate of 6% per annum and a replacement of capital by investment at 4%....	$15,286,326.00
9b.	The value in the mine as of March 1, 1913, of 2,964,599,926(5) lbs. of copper to be mined during the remaining life of the property, allowing for interest at the rate of 6% per annum and a replacement of capital by investment at 4%, less 6% compounded for the 3 years and 10 months, March 1, 1913, to December 31, 1916, is.....	112,417,291.00
	Making the total value as of March 1, 1923	127,417,291.00

10. The total value "en bloc" (9) divided by the total estimated number of per-pound units (2) gives a per-pound unit value to be used in each year to determine the amount of depletion to de deducted under the ruling of the Treasury decision of... *3.026 c.

"For the year 1916—mined during the year, 109,767,451 lbs. × 3.062 c. = $3,361,079.44."

In this statement plaintiff contended that the determination of the value of the whole, or a portion of the physical and tangible assets of a corporation, by the ascertainment of the market value of its shares, with adjustments, has no support in law, and contended that the value of its mining property as of March 1, 1913, should be determined at $127,417,291 in accordance with the above statement. The Commissioner of Internal Revenue changed certain factors in this computation and determined that the fair market value of the plaintiff's property on March 1, 1913, for the purpose of determining the depletion allowance deductible for income tax was $93,678,245.28.

IV

On July 30, 1920, the plaintiff duly filed with the said collector of internal revenue its return on official form 707, with a rider attached thereto, for the year ended June 30, 1921, for the special tax imposed by section 1000 of Title X of the revenue act of 1918. Upon said return, plaintiff reported as the fair value of its capital stock for the preceding year ending June 30, 1920, determined by Exhibit [fol. 27] B in such said return, the sum of $34,803,608.99, and as the total tax due thereon the sum of $34,798.00. (A true copy of said return and rider as filed by plaintiff is made a part of this finding by reference thereto.)

V

Plaintiff at all times mentioned in the petition herein kept, and now keeps, its accounts and records on the basis of the calendar year. The stock of plaintiff at all times mentioned in the petition herein, was, and now is, all common stock. On December 31, 1919, there were outstanding 1,577,179 shares of plaintiff's common stock, each share having a par value of $10. The same number of shares was outstanding during all of 1919 and 1920.

VI

Said outstanding shares of common stock of plaintiff were at all times mentioned in the petition herein listed on the New York Stock Exchange. During the calendar year 1919, 537,938 shares of said common stock were traded in in bona fide transactions upon the New York Stock Exchange, such transactions occurring on prac-

*This figure is erroneous. The correct figure is 3.062 c.

tically every business day. The average of the twelve monthly mean prices realized on the above transactions in each of the twelve months of the year 1919 was $22.067 per share.

VII

The value ($34,803,608.99) reported by plaintiff on Form 707 as the fair value of its total capital stock (determined by Exhibit B) was determined by multiplying the number of shares outstanding during its last preceding fiscal year, the calendar year 1919, by the average sale value of common stock per share during 1919, determined as above stated, and was based directly upon the said sales and purchases of plaintiff's shares of stock in the transactions on the New York Stock Exchange during said year 1919, as set out herein above.

VIII

The information stated on said official form 707 as to the purchases and sales of shares of plaintiff's common stock, as aforesaid, was stated for the period and in the manner required by the instructions on said official Form 707 and the regulations of the Treasury Department, and the computation of the average sale value of common stock per share from such sales was made in the manner required by the instructions on said form and in said regulations. The parties hereto agree that for the purposes of this suit, the value of the corporate assets, in so far as such value may be determined to indicate the fair average value of the plaintiff's capital stock for the year ending June 30, 1920, may be determined as of December 31, 1919, and that the average sale value of the shares of the common stock of the plaintiff, in so far as such average selling price may be determined to indicate the fair average value of the plaintiff's capital stock for the year ending June 30, 1920, may be determined by tak-
[fol. 28] ing the average of the twelve monthly mean prices realized on sales in the transactions of the New York Stock Exchange, referred to herein above, during the calendar year 1919.

IX

Upon the capital stock tax return filed by the plaintiff on July 30, 1920 (as set out in Finding IV hereof), a special tax was assessed against plaintiff under section 1000 of the revenue act of 1918 in the sum of $34,789.00. The plaintiff duly paid said assessment, upon notice and demand, to the said collector of internal revenue.

X

After the receipt by the Treasury Department of the capital stock tax return with attached rider (filed by the plaintiff on July 30, 1920, as set out more fully in Finding IV hereof), and upon an examination of the return and rider by the Commissioner of Internal Revenue, it appeared that the valuation of property reported

by the plaintiff on the first line of Exhibit A of its capital stock tax return differed from and was lower than that shown by the statement of plaintiff referred to in Finding III hereof. Said rider stated that the book figures as stated on Exhibit A did not include the valuation used as the basis of depletion in computing Federal Income taxes. Thereupon on December 30, 1920, the Bureau of Internal Revenue addressed a communication to the plaintiff in words and figures as follows:

CST-2 N. Y.—CAD.

December 30, 1920.

Ray Consolidated Copper Company, 25 Broad Street, New York, N. Y.

GENTLEMEN: Your capital stock tax return for the 1921 taxable period, reporting a fair value of $34,803,608.99, as shown by Exhibit B of the return, has been received.

A statement accompanying the return is to the effect that the book figures, as stated under Exhibit A, do not include the valuation used as the basis of depletion in computing Federal income taxes.

Special instructions, paragraph 6, on page 4 of Form 707, state: "* * * In the case of mines, oil and gas wells, other natural deposits, and timber, valuations reported as the basis of depletion in computing Federal income and profits taxes should be shown in the 'Fair value' column."

As the valuation claimed for depletion purposes is evidently in excess of the figure shown on the books and would in all probability greatly increase the valuation as shown by Exhibit A, it is requested you state the fair value of the item in question as well as your reasons for not considering the valuation reflected through the fair value columes as indicative of the fair value of your capital stock.

Respectfully, James Hagerman, Jr., Deputy Commissioner.
E. M. F.

[fol. 29] In reply to the above-mentioned letter, the plaintiff on January 12, 1921, addressed a letter to the Deputy Commissioner of Internal Revenue, in words and figures as follows:

CST—2 N. Y.—C. A. D.

Ray Consolidated Copper Company

January 12, 1921.

Hon. James Hageman, Jr., Deputy Commissioner of Internal Revenue, Washington, D. C.

SIR: By your letter of December 30 (with identifying reference as above) you refer to our capital stock return for the 1921 taxable period, call attention to the statement accompanying the return to

the effect that the book figures as stated under Exhibit A do not include the valuation used as a basis of depletion in computing Federal income taxes, refer us to the instructions contained in paragraph 6 on page 4 of Form 707, and request that we now furnish a statement of the depletion valuation.

Complying with your request, we advise you that the valuation of the mineral property of this company as of March 1, 1913, as now determined in the Income Tax Unit of the Bureau of Internal Revenue is $93,678,245, from which must be deducted all items to be treated as credits to depletion reserve since that date amounting, in total up to December 31, 1919, to $13,318,384.31. This valuation was used by the company in filing its income and excess profits tax return for 1919.

We are advised that the depletion valuation, necessarily made as of March 1, 1913, has little if any bearing upon the "fair average value of the capital stock" of the company for the 1921 period. The proper valuation of our capital stock for that period rests upon the grounds which we have set forth in our return.

Your letter indicates that you may be inclined to regard the depletion valuation as interrelated with the capital stock valuation. We feel that our views upon this very important question can be more satisfactorily presented and those of the department more satisfactorily discussed in oral conference than by exchange of letters. After such conference we shall be glad to file a statement of our views, should that prove to be necessary.

Therefore, we respectfully ask such a conference with the proper officers of the bureau, at a convenient time and place to be named by you.

Respectfully, Arthur J. Ronaghan, Assistant Secretary.

The Commissioner of Internal Revenue thereupon caused to be made an audit of the capital stock tax return filed by plaintiff on July 30, 1920, as aforesaid, and determined the fair value of the property of the plaintiff as of December 31, 1919, to be the sum of $93,678,245.28. This value was determined from the statement of plaintiff that its mining property for depletion purposes was $127,417,291 on March 1, 1913 (as more particularly referred to in Finding III hereof), and upon other information. The fair value of such property as of December 31, 1919, so determined by the [fol. 30] Commissioner of Internal Revenue, was fixed at $93,678,245.28. All other items shown by the plaintiff under "Debits and assets" of Exhibit A of its return were adopted by the Commissioner of Internal Revenue. Under the title "Credits and liabilities" of Exhibit A of the plaintiff's capital stock tax return, the Commissioner of Internal Revenue adopted all the items and figures included therein by the plaintiff, and in addition thereto allowed the claimant $13,318,384.31 as its depletion allowance on account of ore removed since March 1, 1913. As a result of this audit the total of debits and assets was determined by the commissioner to be $121,417,862.95, and the total of credits and liabilities were determined

by the commissioner to be $17,507,453.88. The difference between these two amounts, to wit, $103,910,409.07, was determined and fixed by the commissioner as the fair value of the total capital stock of the plaintiff, by which value the amount of capital stock tax due from the plaintiff was to be measured and computed. Such computation resulted in an additional capital stock tax due from the plaintiff in the sum of $69,107.00. (A true and correct copy of the capital stock tax return filed by plaintiff on July 30, 1920, as stated in Finding IV hereof, showing the changes made therein by the commissioner, the fair value of the assets as determined by the commissioner, and the additional tax due, is marked "Exhibit No. 2" and made a part hereof by reference.)

XI

Under date of February 23, 1922, the Commissioner of Internal Revenue notified the plaintiff by letter that an additional assessment of capital-stock tax amounting to $69,107.00 would be made against it for the year ending June 30, 1921. Said letter contained the following statement:

"You contend that the fair value of your capital stock is represented by the average prices of shares of stock established through market trading, whereas this office holds that in the case of your company, the fair value of the capital stock considered as a whole is not materially less than the net fair value of the assets. By using the values established for depletion purposes in connection with Federal taxes, the net worth reflected by the excess of assets over liabilities is $103,910,000.00, which is considered indicative of the fair value of the capital stock for the purpose of this tax. You contended for a valuation of the mineral land as of March 1, 1913, less depletion sustained, equal to or in excess of the values shown in the above computation. Furthermore, it is not shown that there has been any material change from such values.

"On the basis determined, additional tax is computed as follows:

Fair value	$103,910,000.00
Deduction	5,000.00
Fair value in excess of $5,000	103,905,000.00
Tax at $1 for each full $1,000	103,905.00
Tax paid	34,798.00
Additional tax due	69,107.00

In determining the net fair value of the assets on December 31, 1919, the Commissioner of Internal Revenue took as the value of [fol. 31] the plaintiff's property on that day the sum of $93,678.-245.28. This amount had therefore been determined by the Commissioner of Internal Revenue to be the fair market value of such prop-

erty on March 1, 1913, for the purpose of computing the depletion deduction to which the plaintiff was entitled in computing taxable income under the revenue act of 1916. Because of such valuation of plaintiff's property, the said Commissioner of Internal Revenue determined the item of "Property" to be $93,678,245.28 instead of $8,657,620.28 as reported by the company in its return filed as above stated hereinbefore. The commissioner allowed as an additional deduction on Exhibit A of Form 707 filed by plaintiff as aforesaid, the amount of $13,318,384.31 as depletion sustained through removal of ore between March 1, 1913, and December 31, 1919. As to all other assets and liabilities, the commissioner accepted the amounts reported by the company in Exhibit A on said official Form 707. In this manner the commissioner determined that the net fair value of the assets of the plaintiff on December 31, 1919, was $103,910,409.07 and estimated and determined that the fair value of the capital stock of the plaintiff on that date was $103,-910,409.07. In accordance with said determination, the commissioner assessed an additional capital-stock tax in the amount of $69,107 against the plaintiff, and forwarded the same for collection to the collector of internal revenue.

XII

Thereafter, on March 28, 1922, the said collector of internal revenue made demand upon plaintiff for the payment of said additional capital-stock tax of $69,107. Such additional amount was based wholly upon the increase in the amount of the "fair value" of the capital stock of the plaintiff resulting from the use of the aforesaid value for the mineral property. On April 6, 1922, plaintiff duly filed with the said collector of internal revenue a claim for abatement of said additional assessment of capital-stock tax amounting to $69,107. Said claim for abatement was rejected by the said Commissioner of Internal Revenue under date of May 27, 1922.

XIII

Thereafter, on June 2, 1922, the said collector of internal revenue made a second demand for the payment of said additional assessment of capital-stock tax for the year ending June 30, 1921, amounting to $69,107, and also made demand for interest on said sum at the rate of one per cent per month for one month, amounting to $691.07. On June 5, 1922, the plaintiff, under threat by the said collector of seizure and sale of its property if it failed to make said payments, and in the belief that said threat would be carried out, paid to the said collector the said sum of $69,107 for additional capital-stock tax and the said sum of $691.07 as interest thereon. The total amount so paid was $69,798.07. Said payments were made under duress and protest, and at the time of making such payments the plaintiff filed with the said collector of internal revenue a written protest against such additional assessment and against the payment [fol. 32] thereof and of interest thereon. Exhibit A attached to the

petition herein is a true and correct copy of such protest and the contents thereof are made a part hereof by reference.

XIV

The total sum of $69,798.07 so paid by the plaintiff under protest to the said collector was thereafter by him turned over and deposited into the Treasury of the United States of America as in the usual course of his official business.

XV

On June 14, 1922, the plaintiff duly filed with the said collector a claim for refund of said payment of $69,798.07. (Exhibit B is a true and correct copy of said claim for refund and the contents thereof are made a part of this finding by reference thereto.) Under date of June 29, 1922, such claim for refund was rejected in full by the said Commissioner of Internal Revenue.

XVI

Plaintiff maintains that it is entitled to a refund of $69,798.00 paid by it on June 5, 1922, under duress and written protest to the collector of internal revenue for the second New York district at New York City, New York, as an additional capital-stock tax of $69,107.00 assessed by the Commissioner of Internal Revenue of the United States for the period ending June 30, 1921, together with $691.07 interest thereon. The provision of law upon which the plaintiff bases its claim for such refund is section 1000 of Title X of the act of February 24, 1919, entitled "An act to provide revenue and for other purposes" and known as the revenue act of 1918.

XVII

The parties hereto agree that certain regulations promulgated by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, and certain forms issued by the Commissioner of Internal Revenue, may be referred to without the incorporation of such regulations or forms bodily by quotations in these findings of fact. The regulations and forms so referred to and incorporated herein by reference are the following:

"(a) Regulations No. 38 relating to the capital-stock tax under the revenue act of September 8, 1916, promulgated October 19, 1916.

"(b) Regulations No. 38 (revised) relating to the capital-stock tax under the revenue act of September 8, 1916, promulgated August 9, 1918.

"(c) Regulations No. 50 relating to the capital-stock tax under the revenue act of 1918, promulgated April 29, 1919.

"(d) Regulations No. 50 (revised) relating to the capital-stock tax under the revenue act of 1918, promulgated June 21, 1920.

"(e) Regulations No. 64 relating to the capital-stock tax under the revenue act of 1921, promulgated June 15, 1922.

"(f) Form 707, revised June, 1918."

[fol. 33] XVIII

Plaintiff filed its capital-stock tax return on official Form 707, revised June, 1920, which said form contained certain instructions on page 4 thereof. The instructions so contained thereon are set out fully in the copy of said Form 707 as Exhibits No. (1) and No. (2), and the said instructions are made a part of this finding by reference thereto.

XIX

No other action than as aforesaid has been had on this claim in Congress or by any of the departments. The plaintiff has at all times borne true allegiance to the Government of the United States. It has not in any way voluntarily aided, abetted, or given encouragement to rebellion against such Government. It is and always has been the sole and absolute owner of the claim here presented. It has made no transfer or assignment of said claim or of any part thereof or of any interest therein.

Conclusion of Law

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and that its petition be and the same is hereby dismissed. Judgment is rendered against the plaintiff and in favor of the United States, for the cost of printing the record in this cause, the amount thereof to be fixed by the clerk and by him collected according to law.

Opinion

Booth, Judge, delivered the opinion of the court:

This is a suit to recover the sum of $21,240.30 alleged to be due the plaintiff company because of an alleged revenue tax assessed and collected by the Commissioner of Internal Revenue under the provisions of section 1000, Title X, of the revenue act of 1918 (40 Stat. 1126), which reads as follows:

"Sec. 1000. (a) That on and after July 1, 1918, in lieu of the tax imposed by the first subdivision of section 407 of the Revenue Act of 1916—

"(1) Every domestic corporation shall pay annually a special excise tax with respect to carrying on or doing business, equivalent to $1 for each $1,000 of so much of the fair average value of its capital stock for the preceding year ending June 30 as is in excess of $5,000. In estimating the value of capital stock the surplus and undivided profits shall be included;

"(2) Every foreign corporation shall pay annually a special ex-

cise tax with respect to carrying on or doing business in the United States, equivalent to $1 for each $1,000 of the average amount of capital employed in the transaction of its business in the United States during the preceding year ending June thirtieth.

"(b) In computing the tax in the case of insurance companies such deposits and reserve funds as they are required by law or contract to maintain or hold for the protection of or payment to or apportionment among policyholders shall not be included.

[fol. 34] "(c) The taxes imposed by this section shall not apply in any year to any corporation which was not engaged in business (or in the case of a foreign corporation not engaged in business in the United States) during the preceding year ending June 30, nor to any corporation enumerated in section 231. The taxes imposed by this section shall apply to mutual insurance companies, and in the case of every such domestic company the tax shall be equivalent to $1 for each $1,000 of the excess over $5,000 of the sum of its surplus or contingent reserves maintained for the general use of the business and any reserves the net additions to which are included in net income under the provisions of Title II, as of the close of the preceding accounting period used by such company for purposes of making its income tax return: Provided, That in the case of a foreign mutual insurance company the tax shall be equivalent to $1 for each $1,000 of the same proportion of the sum of such surplus and reserves, which the reserve fund upon business transacted within the United States is of the total reserve upon all business transacted, as of the close of the preceding accounting period used by such company for purposes of making its income tax return.

"(d) Section 257 shall apply to all returns filed with the Commissioner for purposes of the tax imposed by this section."

The Ray Consolidated Copper Company is a domestic corporation incorporated under the laws of the State of Maine. The company is engaged on a large scale in the general mining, milling, and smelting of copper ore. On July 30, 1920, the plaintiff company filed with the collector of internal revenue for the second district of New York, on forms prescribed and in pursuance of regulations adopted by the Commissioner of Internal Revenue, its return upon which capital-stock taxes in accord with the foregoing statute were to be assessed. Exhibit B discloses the average sale value of 537,938 shares of the plaintiff's 1,577,179 shares of common stock outstanding and traded in on the New York Stock Exchange during the calendar year 1919. The computation given and the results obtained were reached by taking the mean of the high and low sales for each month of the calendar year. By this process an average value of $22.067 is accorded to each share, and multiplied by the whole number of shares issued and outstanding gives to the total number of shares a resultant value of $34,803,608.99. Having then reached this claimed demonstrable conclusion the plaintiff company, in a separate note, attached to its return, contended that the method employed was and is within the terms of the capital stock tax act

and the intent of Congress when the tax was laid upon "the fair average value of its capital stock for the preceding year." A check for $34,798 in payment of the tax according to its contention accompanied the return.

The Commissioner of Internal Revenue declined to accede to plaintiff's contention, and instead assessed and collected the tax on the basis of the net assets of the corporation. The commissioner gave full credit to all the evaluation estimates of the plaintiff with respect to its corporate property save one. The basic capital of the corporation is an extensive and valuable copper mine in Arizona. The plaintiff returned this property as worth $8,657,620.28. The commissioner enhanced its worth to $32,282,993.56. The commissioner's conclusion respecting this item of mining property was predicated [fol. 35] exclusively upon a return previously made by the plaintiff, where for the basis of ascertaining income taxes the corporation itself valued the mine at $127,417,291. Subsequently, by the application of a depletion allowance formula put in force by the commissioner, and satisfactory to the plaintiff, the value of the mine was fixed at $93,678,245.28. Allowing the plaintiff its conceded ratio of depletion and extending the same over a period of six years from March 1, 1913, to December 31, 1919, the commissioner finally fixed the mining property as worth on the latter date $32,282,993.56 for the purposes of capital-stock assessment. The plaintiff in this litigation makes no protest against the proceedings of the commissioner referable to the accuracy of his computation, but the challenge is to the method employed. Therefore it is conceded that if the commissioner was within his legal rights in assessing and collecting the tax upon the fair average value of its net assets, fixed by him after allowing all just credits and debits at $55,828,541.66, it may not recover the alleged overpayment of $21,240.30 with interest thereon, for which this suit is brought, the plaintiff having paid the same under protest.

It is apparent from the stipulated findings and what has just been said that the single issue involved herein is the construction of the section of the statute authorizing the imposition of the tax. The plaintiff insists that the fair average value of its shares of stock "based upon bona fide transactions on a large scale in the open market establishes the value of its capital stock for the purpose of the tax," the defendant, on the other hand, insisting that the term "capital stock" as used in the act has no such restricted meaning; that clearly within the intendment of the statute Congress was imposing an excise tax on domestic corporations as going concerns, a tax on the privilege of conducting business as such, and directed the admeasurement of the same upon the value of such a privilege, ascertainable from the net value of its holdings, its possessions, the things tangible and intangible which concentrated into a single unit are fundamentally its capital stock, from which earnings and dividends are expected to flow. As aptly stated, "the tools," the instrumentalities available to the management in the prosecuton of the corporate enterprise; that no precise, unyielding method, resting upon a fixed

standard of evaluation, such as the average market value of the corporation's shares of stock, is intended by the term "capital stock," but that, on the contrary, the generality of the tax, the differing and manifold complexities of corporate organization, the character of business involved, clearly import a legislative intention to tax "the entire potentiality of the corporation to profit by the exercise of its corporate franchise."

There are many cases in the books where this identical controversy has been involved. They illustrate with preciseness the seeming flexibility of the meaning of the term "capital stock." In both the courts and the financial world the term itself has not assumed a fixed and determinate significance capable of identifying its use as alone applicable to shares of stock of a corporation as opposed to accumulated assets of the same. As a matter of fact, it is frequently used in legislation to indicate one or the other. It may, we think, be said—at least the adjudications of the State courts are almost uniform upon this point—that in the imposition of property taxes laid upon the capital stock of corporations the term is held to mean the assets of [fol. 36] the corporation, its real possessions which the corporation uses and employs in its corporate activities. Pacific Hotel Co. v. Lieb., 83 Ill. 602; Chicago Union Traction Co. v. State Board of Equalization, 112 Fed. 607; Henderson Bridge Co. v. Commonwealth, 99 Ky. 623; 166 U. S. 150; Security Co. v. Hartford, 61 Conn. 89-101; State v. Duluth Gas & Water Co., 76 Minn. 96; People v. Coleman, 126 N. Y. 433; Adams Express Co. v. Ohio, 166 U. S. 185; First National Bank v. Douglas Co., 124 Wis. 15.

In excise taxing statutes where there are no qualifying terms indicative of an express limitation of the term "capital stock" the ambiguity thus arising is resolvable only by recourse to the usual and elementary principles of statutory construction. What did Congress intend when it used the term as it did in this particular law?

The imposition of excise taxes, especially corporate excise taxes, is not a new form of revenue legislation. It has been frequently resorted to by both the State and Nation, and in the course of such legislation the value of the corporation's shares of stock, its assets, its net and gross income, etc., have been employed as the standard of measuring the tax. As a matter of fact, the factor of its ascertainment rests in the discretion of the legislature enacting the law. Spreckles Sugar Co. v. McClain, 192 U. S. 397; Flint v. Stone Tracy Co., 220 U. S. 107.

By the act of June 13, 1898, 30 Stat. 448, Congress imposed a special excise tax upon the banking business of the country. A mere reading of the law seems sufficient to confirm the assertion that its policy was rigidly limited to the computation of the same upon the basis of capital, surplus, and undivided profits. In other words, the tax was to be measured by the net assets of the bank. The act of October 22, 1914, 38 Stat. 745, continued the banker's tax of 1898, with changed provisions as to the amount of the imposition, but still adhering to the legislative policy of measuring

the tax in accord with the net assets of the bank. Leather Manufacturers National Bank v. Treat, 128 Fed. 262.

In 1916 Congress adopted a more comprehensive policy in the matter of excise tax legislation, and instead of limiting the tax to bankers broadened the scope of the enactment and included all domestic corporations, joint-stock companies, and associations organized for profit and having a capital stock represented by shares. The tax was to be measured upon the basis of "the fair value of its capital stock, and in estimating the value of capital stock the surplus and undivided profits shall be included." The act of 1918, which followed the general policy of the act of 1916, substituted as the basis for computing the tax "the fair average value of its capital stock" instead of the "fair value" of the same.

An analysis of this legislation, considered in the light of its inception, as appears from the banker's taxing statute, clearly imports a legislative policy to measure the excise taxes provided for on the basis of the assets of the corporation. It was not until 1916, when the field was broadened and all domestic corporations came within the scope of the capital stock tax law, that doubt in this respect could possibly arise.

In the case of Central Union Trust Co. v. Edwards, 282 Fed. 1008, a case involving the construction of the act of 1916, the plaintiff [fol. 37] contended that "capital stock" in association with the other provisions of the law clearly meant paid-in capital, surplus, and undivided profits, less liabilities, or, in other words, net assets. It so happened in this particular case that the market value of the corporation's shares of stock was largely in excess of its book value, due to large and most attractive dividend distributions for some years. The collector of internal revenue, ignoring this contention, assessed and collected the tax upon the basis of the corporation as a going concern, including in his estimate all the factors, both tangible and intangible, which added to and were possessed by the corporation in the course of its going business. In other words, the collector computed the tax upon the "fair value of total capital stock," without limiting the computation to net assets. Manifestly this resulted in a largely increased tax. The district judge, in a written opinion, sustained the collector and was affirmed by the circuit court of appeals for the second circuit in 287 Fed. 324.

The reasoning of the court in both opinions cited above follows the channel marked out by the Supreme and State courts in construing corporate excise tax laws. Emphasis is put upon the character of the tax, an exaction demanded for a privilege, an imposition laid upon the legal entity known as a corporation and measured by its resources, "the entire potentiality of the corporation to profit by the exercise of its corporate franchise," and not upon property emanating therefrom but belonging to individuals.

When the Congress used the expression "the fair average value of its capital stock," as it did in the act of 1918, it manifested an intent to prescribe an equitable basis for the assessment of the tax, a design

to apply justly a tax exaction which, because of its general extent, in pursuance of the taxing policy adopted, was incapable of restraint within rigid rules for ascertainment. "Fair" means "just"; "average" indicates apportionment. It is not difficult to obtain an average value, and it would appear as a logical inference that the interposition of the adjective "fair" was notice that in the adoption of "capital stock" as the basic factor for computing the tax it was not always possible to fix its average value, and therefore some discretion, some leeway, must be granted, some room allowed, so that the burden imposed would fall with measurable equality upon all corporations taxed. "Fair value" means market value ordinarily, the amount which sellers are willing to take and buyers to give, and if a fair, open market were always available, it may well be that the fair average value of a corporation's capital stock is the average of its market value. But the vast majority of domestic corporations do not list their shares of stock upon the New York or local stock exchanges. In fact, an insignificant number do. Many incorporated insurance companies have no shares of stock; others have both preferred and common; in hundreds of corporations the stock is closely held and rarely, if ever, sold. So that it seems to us that Congress was endeavoring in the use of the term "fair average value of the capital stock" to formulate a basis for the computation of the tax that would allow the commissioner in its assessment to take into consideration the resources of the corporation, its assets and liabilities, its entire possessions actually at work to produce earnings, the instrumentalities available to its management as a going concern, [fol. 38] and, from the sum total thus ascertained, strike a fair average value, a value fair to the corporation and to the Government. As said by Mr. Justice Brewer in Powers v. Detroit, G. H. & M. Ry. Co., 201 U. S. 543, 561:

"Again, the tax is to 'be estimated upon the last annual report of the corporation.' While such report might be expected to include not merely the property belonging to the corporation but also the number and names of the stockholders and the number of shares held by each, and possibly also the amount paid in by each yet the word 'estimated' carries with it the idea of valuation rather than the mathematical apportionment. It suggests that the property reported by the corporation is to be the basis upon which the assessors shall make their valuation, so that the tax is 'estimated' upon that property rather than fixed by mere process of multiplication or division. * * * Under those circumstances we are of the opinion that the tax provided for by section 9 is a tax upon the property of the corporation and not a tax upon the shares of stock held by the shareholders."

If, as contended for, the market value of the shares of stock is the fundamental and only basis for measuring the tax when available, the word "fair" is decidedly meaningless. No difficulties present themselves in ascertaining the real, mathematical average market value of the same.

Again, the 1918 capital stock act contains an express provision:

"In estimating the value of capital stock the surplus and undivided profits *shall* be included." (Italics our-.) Congress during the whole course of excise-tax legislation has persistently and continuously inserted this provision in connection with the term "capital stock." Assuredly it may not be said that under any circumstances this clause is to be ignored. It is, indeed, the one plain and unambiguous provision which points out a definite, inflexible factor for entering into the estimate of capital stock. "*Shall* be included" is the language of the statute. Obviously, when given effect it precludes the idea of earnings of the corporations as furnishing the basis of computation for the tax. It precludes a consideration of profits, and discloses an intended purpose to use assets—at least assets represented by surplus and undivided profits—as one factor in arriving at the value of capital stock. But it is said that this provision serves a dual purpose. It furnishes a method for ascertaining the value of shares of stock when no market value of the same is available, and it prevents the commissioner from taking the par value of the shares in arriving at his estimate. There is no language in the statute which warrants us in dealing with alternatives. The difficulties in the administration of the law are not before the court for correction. It is no concern of ours whether the market value of shares of stock reflect the paid-in value of the authorized capital and the surplus and undivided profits, or not. The law says, and plainly says, that surplus and undivided profits shall be included in concluding an estimate of capital stock, and it may not be legally administered without their consideration. If the clause was resigned to preclude resort to par value, it signally fails in effectiveness, if market value of the shares [fol. 39] of stock, when available, is the single standard for innumerable shares of corporate stock are quoted for years on the stock market and freely offered at less than their par value.

When Congress expressly included surplus and undivided profits in the estimation of the capital stock of a corporation, it necessarily excluded resort to the market value of the shares of stock of the corporation, even when available, as the one and only basis of assessing an excise tax against the same, and intentionally predicated the assessment of the tax upon an asset basis. Home Savings Bank v. Des Moines, 205 U. S. 503.

Some things said and words used during a running but not prolonged interrogation of the chairman of the committee in charge of the bill in the House of Representatives, just prior to its passage, lend countenance to the plaintiff's insistence. Taken as a whole, however, it is more impressive as an exposition of opinion as to the detail of administration rather than a construction of the law. In any event, what was said is not sufficiently explicit to turn the issue in this case. No express meaning was definitely given to the term capital stock, differentiating it from shares of stock.

The commissioner's administration of the law and the regulations promulgated by him in nowise militate against its uniform appli-

cation. Corporate organization covers every form of business enterprise, and if we are correct in our view as to the meaning of capital stock, it is manifestly impossible to prescribe a set rule for its ascertainment in each particular instance. The plaintiff company's organization and business activity illustrate the manifold difficulties. Like many other corporations dependent for prosperity upon extracting elements from the earth, its capital stock is subject to depletion and fluctuation. Therefore it is apparent that what may reflect the average value of capital stock as applicable to one class of corporations may be wholly inapplicable to others of a different character and engaged in a wholly different business. The uniform measure of the tax is the fair average value of the capital stock, and if the regulations and the assessments made by the commissioner result in disclosing the fair average value, it may not be said to be without uniformity because the exact, unyielding basis is not employed in every instance. The plaintiff's contention, if conceded, would not remove the contingent aspect of regulations necessary to administer the law with uniformity or simplify its administration.

The facts in the case of the Central Union Trust Co. v. Edwards, supra, demonstrate the situation. The average market value of the trust company's shares of stock was $788.75 each, the book value $400 each. So that if two corporations, capitalized at the same amount, paying the same dividents, in one case where market value of its shares of stock is available, would be taxed on the basis of $788.75 for each share, and the other, where market value is not available, on the basis of $400 per share, and this situation was not unusual during the war. In other words, if plaintiff is correct, the tax is computed in some cases upon the average market value of the corporation's shares of stock, never less than par, and in others upon the assets of the corporation. Whatever else may be said, it is difficult to believe that Congress intended capital stock to mean shares [fol. 40] of stock predicated upon market value in one instance and upon asset value in another, differentiating the two by the interposition of sales only.

Capital stock and shares of stock owned by an individual have, and always have had, a distinct meaning. How simple it would have been for Congress to have used the term "shares of stock" or "shares of capital stock," instead of "capital stock," if it intended the former. If it was not contemplated by Congress to employ the assets of the corporation to measure the tax, why did it use apt words to so indicate? It had before it the act of 1916 containing a descriptive provision, viz. "having a capital stock represented by shares." It was familiar with the legislative policy of taxing capital employed and use in corporate business; it knew excise taxes had been measured by income; it knew it had the *un*destricted right to select the measure and method of computing the tax; its knowledge of corporate organization was complete, and from what has been said, may we import into the law the word "shares," when the statute reads "capital stock," a term when used in connection with corporate taxation is more fre-

quently held to contemplate the actual holdings and possessions of the corporation, its own property, as opposed to shares of stock? More especially is this true when the term itself is considered in connection with the express mandate to include surplus and undivided profits in estimating the tax.

We had prepared and were just on the point of announcing the opinion in this case when the opinion of the Supreme Court in Hecht v. Malley, reached the court. The Hecht case, decided May 12, 1924, we think, disposes of this one. The opinion follows the decision of the Circuit Court of Appeals in Central Union Trust Co. v. Edwards, supra.

The petition will be dismissed. It is so ordered.

Hay, Judge; Downey, Judge; and Campbell, Chief Justice, concur.

[fol. 41] VI. Judgment of the Court

At a Court of Claims held in the City of Washington on the Nineteenth day of May, A. D., 1924, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises find in favor of the defendant, and do order and adjudge that the plaintiff as aforesaid, is not entitled to recover any sum in this action of and from the United States; and that the petition herein be and the same hereby is dismissed: And it is further ordered and adjudged that the United States shall have and recover of and from the plaintiff, as aforesaid, the sum of forty-eight dollars and forty-nine cents ($48.49), the cost of printing the record in this court, to be collected by the Clerk, as provided by law.

By the Court.

VII. Plaintiff's Application for Appeal—Filed June 2, 1924

From the judgment rendered in the above-entitled cause on the 19th day of May, 1924, in favor of the United States, claimant, by its attorneys, Root, Clark, Buckner & Howland, on the 2nd day of June, 1924, makes application for, and gives notice of an appeal to the Supreme Court of the United States.

Root, Clark, Buckner & Howland, Attorneys for Claimant.

VIII. Order Allowing Appeal

On this 9th day of June, 1924, it is ordered by the Court that the plaintiff's application for appeal be and the same is allowed.

By the Court.

[fol. 42] IN COURT OF CLAIMS OF THE UNITED STATES

[Title omitted]

CLERK'S CERTIFICATE

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings of the above-entitled cause; of the argument and submission of case; of the findings of fact, conclusion of law and opinion of the court by Booth, J.; of the judgment of the court; of the plaintiff's application for appeal; of the order of the court allowing said application.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this Tenth day of June, A. D., 1924.

F. C. Kleinschmidt, Assistant Clerk Court of Claims. (Seal of Court of Claims.)

[fol. 43] IN SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1924

No. 443

RAY CONSOLIDATED COPPER COMPANY, a Corporation, Appellant,

against

THE UNITED STATES, Respondent

STIPULATION CORRECTING CLERICAL ERROR IN RECORD—Filed Aug. 4, 1924

A clerical error having been made in preparing the record in the above case in the Court of Claims in that said Court inadvertently adopted as its findings of fact the original agreed statement of facts instead of the amended agreed statement of facts, and it clearly appearing from the record below that both parties requested the Court to adopt the amended agreed statement of facts as its findings of fact and that the Court decided the case on the basis of the amended agreed statement of facts and intended to adopt such amended agreed statement of facts as its findings of fact,

It is hereby stipulated and agreed by and between Arthur A. Ballantine, attorney for the Appellant, and Robert H. Lovett, Assistant Attorney General, and James M. Beck, Solicitor General, attorneys for The United States, that the transcript of record in the above entitled appeal be hereby amended to correct said clerical error by eliminating therefrom the findings of fact No. I to No. XIX, appearing on pages 24 to 33 of said transcript, and substituting in lieu thereof the findings of fact attached hereto and marked Exhibit

[fol. 44] A which follow verbatim the amended agreed statement of facts of record in the court below.

Dated July 28, 1924.

Arthur A. Ballantine, Attorney for Appellant. Robert H. Lovett, F. K. D., Assistant Attorney General; James M. Beck, F., Solicitor General, Attorneys for the United States.

[fol. 45] EXHIBIT A TO STIPULATION

(1) Ray Consolidated Copper Company, the claimant herein, is, and at all times mentioned in the amended petition herein was, a domestic corporation organized and existing under laws of the State of Maine, engaged in the business of mining and having an office at 25 Broad Street, borough of Manhattan, in the city and State of New York.

(2) Claimant was incorporated on May 14, 1907, for the purpose of conducting general mining, milling and smelting operations. During 1919 and prior years claimant owned, and still owns, together with other properties, mining lands near Ray, Arizona. In such lands the ore bodies occur in what is known as a blanket formation, that is to say, the ore is found in a horizontal zone, somewhat irregular on its upper and lower boundaries, but is distinguished from veins or lodes in that it does not extend at an angle and to great depths into the earth. The particular character of this deposit renders it susceptible of accurate measurement as to its extent, and its mental contents capable of definite ascertainment. The property was explored very thoroughly by the claimant, beginning in 1907, by what are known as "churn drills," and the tonnage and metallic content of the ore deposit were accurately determined. The property was developed by shafts and drifts on an elaborate scale and the actual later mining of the ore on a very large scale has demonstrated the accuracy of the sampling made by means of the drill holes. The property was fully equipped for such mining by the construction of a concentrating plant with a capacity of 12,500 tons per day. During 1919, 1920, and prior years, this mining property was actively operated by claimant and a large amount of copper [fol. 46] was mined, smelted, and sold. On December 31, 1919, large reserves of unmined ore remained.

(3) In the year 1918 the claimant submitted to the Commissioner of the Internal Revenue a memorandum as to the value of its mineral property on March 1, 1913 (upon which depletion deductions for income tax purposes were to be based), reading in part as follows:

Ray Consolidated Copper Company—Memorandum as to Depletion Allowance for Income Tax Return Pursuant to Treasury Decision No. 2446

"The mining property of this company is owned in fee and was acquired prior to March 1, 1913.

"The method by which the value of the property as of March 1, 1913, was determined is as follows:

1a. The gross copper contents of the mine as of December 31, 1916, was estimated by the company's engineers at	3,798,422,834 lbs.
1b. To the foregoing was added the gross copper contents of the ore mined from March 1, 1913, to December 31, 1916, or	362,769,548 lbs.
2. Making the total gross copper contents, as of March 1, 1913	4,161,192,382 lbs.
3. The life of the mine from March 1, 1913, is estimated at 24.29 years. This is based on the period elapsed from March 1, 1913, to December 31, 1916, 3.83 years plus 20.46 years, being the time which will be required to deplete the above number of pounds of copper based on a daily production of 12,500 tons	24.29 years
4a. The net copper contents of the ore mined to December 31, 1916, was	236,980,583 lbs.
4b. The net copper contents of the balance of the ore in the mine estimated upon an extraction of 78.04% is	2,964,599,926 lbs.
5. Making a total net copper contents as of March 1, 1913	3,201,580,509 lbs.
6. The selling price of copper during the life of the mine was based on the average price of copper for the 10 years ending December 31, 1916, which was	16.6739 c. per lb.
7. The cost of production over the remaining life of the mine is estimated at	7.7181 c. per lb.
8. The estimated net value per lb .of copper, using the foregoing selling price and cost of production is	8.9558 c. per lb.
9a. The value in the mine as of March 1, 1913, of 236,980,583 (4) lbs. of copper mined during the 3 years and 10 months ending December 31, 1916, allowing for interest at the rate of 6% per annum and a replacement of capital by investment at 4%	$15,286,326.00

9b. The value in the mine as of March 1, 1913, of 2,964,599,926 (5) lbs. of copper to be mined during the remaining life of the property, allowing for interest at the rate of 6% per annum and a replacement of capital by investment at 4%, less 6% compounded for the 3 years and 10 months, March 1, 1913 to December 31, 1916, is.....	112,130,965.00
Making the total value as March 1, 1913..	127,417,291.00
10. The total value "en bloc" (9) divided by the total estimated number of per-pound units (2) gives a per-pound unit value to be used in each year to determine the amount of depletion to be deducted under the rulings of the Treasury Decision of.....	[1]3.026c.

[fol. 47] "For the year 1916, mined during the year, 109,767,451 lbs. x 3.062c. = $3,361,079.44."

In this memorandum claimant contended that the determination of the value of the whole, or a portion of the physical and tangible assets of a corporation, by the ascertainment of the market value of its shares, with the adjustments, has no support in law, and contended that the value of its mining property as of March 1, 1913, should be determined at $127,417,291 in accordance with the above statement. The Commissioner of Internal Revenue at that time made a computation by the same general method as that employed by the claimant in the above computation and determined that the fair market value of the claimant's mining property on March 1, 1913, for the purpose of determining the depletion allowance deductible for income tax was $93,678,245.28.

(4) On July 30, 1920, the claimant duly filed with the collector of internal revenue for the second district, New York, N. Y., its return on official Form 707, with a rider attached thereto, for the year ended June 30, 1921, for the special tax imposed by section 1000 of Title X of the revenue act of 1918. Upon said return, claimant reported as the fair value of its capital stock for the preceding year ending June 30, 1920, determined by Exhibit B in said return, the sum of $34,803,608.99, and as the total tax due thereon the sum of $34,798.00. A true copy of said return and rider as filed by claimant is attached hereto and made a part of this stipulation and marked "Exhibit No. 1." Said Exhibit No. 1 consists of a four-page facsimile of official Form 707, upon which appears a true copy of the words and figures entered thereon and the rider attached thereto by the claimant prior to the filing of said return.

(5) Claimant at all times mentioned in the petition herein kept, and now keeps, its accounts and records on the basis of the calendar

[1] This figure is erroneous. The correct figure is 3.062 c.

year. The stock of claimant at all times, mentioned in the petition herein, was, and now is, all common stock. On December 31, 1919, there were outstanding 1,577,179 shares of claimant's common stock, each share having a par value of $10.00. The same number of shares was outstanding during all of 1919 and 1920.

(6) Said outstanding shares of common stock of claimant were at all times mentioned in the petition herein listed on the New York Stock Exchange. During the calendar year 1919, 537,938 shares of said common stock were traded in in bona fide transactions upon the New York Stock Exchange, such transactions occurring on practically every business day. The average of the twelve monthly mean prices realized on the above transactions in each of the twelve months of the year 1919 was $22.067 per share.

(7) The value ($34,803,608.99) reported by claimant on Form 707 as the fair value of its total capital stock (determined by Exhibit B) was determined by multiplying the number of shares outstanding during its last preceding fiscal year, the calendar year 1919, by the average sale value of common stock per share during 1919, determined as aboved stated, and was based directly upon the said sales and purchases of claimant's shares of stock in the transactions on the New York Stock Exchange during said year 1919, as set out herein above.

(8) The parties hereto agree that for the purpose of this suit the average sale value of the shares of the common stock of the claimant [fol. 48] may be determined by taking the average of the twelve monthly mean prices realized on sales in the transactions of the New York Stock Exchange, referred to herein above, during the calendar year 1919.

(9) Upon the capital stock tax return filed by the claimant on July 30, 1920 (as set out in paragraph 4 of this agreed statement of facts), a special tax was assessed against claimant under section 1000 of the revenue act of 1918 in the sum of $34,798.00. The claimant duly paid said assessment, upon notice and demand, to the said collector of internal revenue.

(10) After the receipt by the Treasury Department of said capital stock tax return with attached rider, and on December 30, 1920, the Bureau of Internal Revenue addressed a communication to the claimant in words and figures as follows:

CST—2 N. Y. CAD. December 30, 1920.

Ray Consolidated Copper Company, 25 Broad Street, New York, N. Y.

GENTLEMEN: Your capital stock tax return for the 1921 taxable period, reporting a fair value of $34,803,608.99, as shown by Exhibit B of the return, has been received.

A statement accompanying the return is to the effect that the book figures, as stated under Exhibit A, do not include the valua-

tion used as the basis of depletion in computing Federal income taxes.

Special instructions, paragraph 6, on page 4 of Form 707, state:

"* * * In the case of mines, oil and gas wells, other natural deposits, and timber, valuations reported as the basis of depletion in computing Federal income and profits taxes should be shown in the 'fair value' column."

As the valuation claimed for depletion purposes is evidently in excess of the figures shown on the books and would in all probability greatly increase the valuation as shown by Exhibit A, it is requested you state the fair value of the item in question as well as your reasons for not considering the valuation reflected through the fair value columns as indicative of the fair value of your capital stock.

Respectfully, James Hagerman, Jr., Deputy Commissioner.
E.MF.

In reply to the above-mentioned letter, the claimant on January 12, 1921, addressed a letter to the Deputy Commissioner of Internal Revenue, in words and figures as follows:

CST—2 N. Y.—C. A. D.

Ray Consolidated Copper Company

January 12, 1921.

Hon. James Hage-man, Jr., Deputy Commissioner of Internal Revenue, Washington, D. C.

SIR: By your letter of December 30 (with identifying reference as above) you refer to our capital stock return for the 1921 taxable period, call attention to the statement accompanying the return to the effect that the book figures as stated under Exhibit A do not include the valuation used as a basis of depletion in computing Fed- [fol. 49] eral income taxes, refer us to the instructions contained in paragraph 6 on page 4 of Form 707, and request that we now furnish a statement of the depletion valuation.

Complying with your request, we advise you that the valuation of the mineral property of this company as of March 1, 1913, as now determined in the Income Tax Unit of the Bureau of Internal Revenue is $93,678,245, from which must be deducted all items to be treated as credits to depletion reserve since that date amounting, in total, up to December 31, 1919, to $13,318,384.31. This valuation was used by the company in filing its income and excess profits tax return for 1919.

We are advised that the depletion valuation, necessarily made as of March 1, 1913, has little if any bearing upon the "fair average value of the capital stock" of the company for the 1921 period. The proper valuation of our capital stock for that period rests upon the grounds which we have set forth in our return.

Your letter indicates that you may be inclined to regard the depletion valuation as interrelated with the capital stock valuation.

We feel that our views upon this very important question can be more satisfactorily presented and those of the department more satisfactorily discussed in oral conference than by exchange of letters. After such conference we shall be glad to file a statement of our views, should that prove to be necessary.

Therefore, we respectfully ask such a conference with the proper officers of the bureau, at a convenient time and place to be named by you.

Respectfully, Arthur J. Ronaghan, Assistant Secretary.

The Commissioner of Internal Revenue thereupon caused to be made an audit of the capital stock tax return filed by the claimant on July 30, 1920, as aforesaid, and determined the fair value of the capital stock of the claimant as of December 31, 1919, to be the sum of $103,910,409.07. In said audit the commissioner changed the item "Property" on page (2) of the return (Exhibit No. 2 hereof) from $8,657,620.28 to $93,678,245.28, and accepted the figures of the plaintiff as to the other items of "debits and assets." The commissioner also allowed all the "credits and liabilities" on page (2) of the return (Exhibit No. 2 hereof) except that he made an additional allowance under the heading "Depletion" of $13,318,384.31. The figure of $93,678,245.28 represents the March 1, 1913, value of the ore in place as determined by the commissioner. The figure $13,318,384.31 represents the depletion, as determined by the commissioner, sustained by mining operations from March 1, 1913, to December 31, 1919. As a result of this audit the total of debits and assets was determined by the Commissioner of Internal Revenue to be $121,417,862.95, and the total of credits and liabilities was determined by the commissioner to be $17,507,453.88, and the net fair value of the assets of the claimant on December 31, 1919, was thus determined by the commissioner to be the difference between these two amounts, to wit: $103,910,409.07, and this amount was determined and fixed by the Commissioner of Internal Revenue as the fair value of the total capital stock of the claimant, by which value [fol. 50] the amount of capital stock tax due from the claimant was to be measured and computed. Such computation resulted in an additional capital stock tax due from the claimant in the sum of $69,107.00. Attached hereto and marked "Exhibit No. 2," and made a part thereof, is a facsimile of the capital stock tax return, consisting of four pages and a rider, as filed by the claimant on July 30, 1920, with the words, figures, and notations written or stamped thereon by the Commissioner of Internal Revenue or officials acting under his directions. All words, figures, and notations appearing on said Exhibit No. 2 which do not appear on Exhibit No. 1 were made thereon by the Commissioner of Internal Revenue or officials acting under his directions after said return had been filed.

(11) Under date of February 23, 1922, the Commissioner of Internal Revenue notified the claimant by letter that an additional assessment of capital stock tax amounting to $69,107.00 would be made against it for the year ending June 30, 1921. Said letter contained the following statement:

"You contend that the fair value of your capital stock is represented by the average prices of shares of stock established through market trading, whereas this office holds that in the case of your company, the fair value of the capital stock considered as a whole is not materially less than the net fair value of the assets. By using the values established for depletion purposes in connection with Federal taxes, the net worth reflected by the excess of assets over liabilities is $103,910,000.00, which is considered indicative of the fair value of the capital stock for the purpose of this tax. You contended for a valuation of the mineral land as of March 1, 1913, less depletion sustained, equal to or in excess of the values shown in the above computation. Furthermore, it is not shown that there has been any material change from such values.

"On the basis determined, additional tax is computed as follows:

Fair value	$103,910,000.00
Deduction	5,000.00
Fair value in excess of $5,000	103,905,000.00
Tax at $1 for each full $1,000	103,905.00
Tax paid	34,798.00
Additional tax due	69,107.00"

(12) Thereafter, on March 28, 1922, the said collector of internal revenue made demand upon claimant for the payment of said additional capital stock tax of $69,107. On April 6, 1922, claimant duly filed with the said collector of internal revenue a claim for abatement of said additional assessment of capital stock tax amounting to $69,107. Said claim for abatement was rejected by the said Commissioner of Internal Revenue under date of May 27, 1922.

(13) Thereafter, on June 2, 1922, the said collector of internal revenue made a second demand for the payment of said additional assessment of capital stock tax for the year ending June 30, 1921, amounting to $69,107, and also made demand for interest on said sum at the rate of one per cent per month for one month, amounting to $691.07. On June 5, 1922, the claimant, under threat by the said collector of seizure and sale of its property if it failed to make said [fol. 51] payments, and in the belief that said threat would be carried out, paid to the said collector the said sum of $69,107 for additional capital stock tax and the said sum of $691.07 as interest thereon. The total amount so paid was $69,798.07. Said payments were made under duress and protest, and at the time of making such payments the claimant filed with the said collector of internal revenue a written protest against such additional asses-ment and against the payment thereof and of interest thereon. Exhibit A attached to the amended petition herein is a true and correct copy of such protest and the contents thereof are made a part of this stipulation.

(14) The total sum of $69,798.07 so paid by the claimant under protest to the said collector was thereafter by him turned over and

deposited into the Treasury of the United States of America as in the usual course of his official business.

(15) On June 14, 1922, the claimant duly filed with the said collector a claim for refund of said payment of $69,798.07. Exhibit B attached to the amended petition herein is a true and correct copy of said claim for refund and the contents thereof are made a part of this stipulation. Under date of June 29, 1922, such claim for refund was rejected in full by the said Commissioner of Internal Revenue.

(16) Thereafter this action was started by the filing of the original petition herein on August 2, 1922. An agreed statement of facts was filed on March 28, 1923, and claimant's request for findings of fact and brief was filed on May 19, 1923. Thereafter, on November 9, 1923, the claimant received a refund from the United States of $48,557.77, this being a refund of a portion of the amount of $69,798.07 claimed in the original petition herein, together with interest on said refund from June 6, 1922, the date of payment. Said refund was accompanied by a "Notice of adjustment of claim for refund," reading in words and figures as follows:

Washington, D. C.

Notice of Adjustment of Claim for Refund

[Claim No. R19048 AWW. District 2, N. Y. Schedule No. CST —R—9—72.]

Ray Consolidated Copper Co., 25 Broad Street, New York, New York.

Interest due from—

(a) Date of payment and filing of specific protest which is on file in the bureau.

(b) Date of payment of additional assessment which was made in this case.

(c) Six months after date of filing claim to date of allowance.

GENTLEMEN: Your claim for refund of additional capital stock tax and one per cent interest thereon for the taxable period ended June 30, 1921, erroneously or illegally collected, has been adjusted as shown below.

Claimed	$69,798.07
Allowed	48,557.77
Rejected	21,240.30

Date of payment June 6, 1922.

[fol. 52] The adjustment shown above is the result of a reconsideration of the claim, in accordance with the attached statement.

Included in the check is $1,245.87, interest allowed on $48,557.77 from June 6, 1922 (b) to November 10, 1923.

A check by the disbursing clerk of the department for the amount refunded is forwarded herewith.

Respectfully, (Signed) R. M. Estes, Deputy Commissioner.
AFH.

CST–2 N. Y.–46–AWW CI–R19048

Ray Consolidated Copper Company

Re Claim for the Refunding of $69,798.07, Additional Capital Stock Tax and One Per Cent Interest, for the Taxable Period Ended June 30, 1921.

The rejection under date of June 29, 1922, of the claim for the refunding of $69,798.07 has been reconsidered.

The corporation reported a fair value of $34,803,608.99, based on its sales on the stock exchange. The natural resources division of the Income Tax Unit valued the mining property of the corporation at $93,678,245.28 and the additional assessment of $69,107 was made by basing the fair value on Exhibit A instead of Exhibit B, and substituting this value for the value as shown by the books of account.

Upon a further examination by the Income Tax Unit, after taking into consideration all elements entering into the value of the copper mining operations, it estimated the value of the physical property to be $32,282,993.56 as of December 31, 1919. By substituting this valuation for the valuation previously used in determining the additional tax, a refund due the corporation is indicated as follows:

Total value of assets		$60,022,611.23
Total liabilities		4,189,069.57
Fair value of capital stock		55,833,541.66
Deduction allowed by law		5,000.00
Fair value in excess of $5,000		55,828,541.66
Tax at $1 for each full $1,000		55,828.00
Tax paid		103,905.00
Tax overpaid		48,077.00
Interest on above		480.77
Total amount overpaid		48,557.77

On November 14, 1923, the claimant received a letter from the Bureau of Internal Revenue showing in detail the manner in which the Commissioner of Internal Revenue had determined that the total value of claimant's assets on December 31, 1919, was $60,022,611.23, and that the total liabilities on December 31, 1919, were $4,189,069.57. A copy of said letter is attached hereto and marked "Exhibit 3" and made a part hereof.

By reason of said refund of $48,557.77, the amount in controversy in this action has been reduced from $69,798.07 to $21,240.30. By leave of the court, an amended petition was filed herein on November 19, 1923.

[fol. 53] (17) Claimont maintains that it is entitled to a refund of $21,240.30, the unrefunded portion of the amount paid by it on June 5, 1922, under duress and written protest to the collector of internal revenue for the second New York District at New York City, New York, as an additional capital-stock tax of $69,107.00 assessed by the Commissioner of Internal Revenue of the United States for the period ending June 30, 1921, together with $691.07 interest thereon. The provision of law upon which the claimant bases its claim for such refund is section 1000 of Title X of the act of February 24, 1919, entitled "An act to provide revenue and for other purposes" and known as the revenue act of 1918.

(18) While the bill which eventually became the revenue act of 1916 was under consideration in Congress, certain discussions took place on the floors of the Senate and of the House. While the bill which eventually became the revenue act of 1918 was under consideration in Congress, certain amendments were made to the section imposing the capital-stock tax, certain committee reports were made and certain discussions took place on the floors of the Senate and of the House. Such of these discussions, reports and amendments as are set out in the Congressional Record, in official reports of committees, or in official prints of the bills at various stages, and such as are pertinent to the matters at issue in this case, are hereby referred to and made a part of this agreed statement of facts, without incorporation of the same herein by quotation.

(19) The parties hereto agree that certain regulations promulgated by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, and certain forms issued by the Commissioner of Internal Revenue, may be referred to, cited, quoted and argued, both orally and in briefs, by the parties hereto, without the incorporation of such regulations or forms bodily by quotations in this agreed statement of facts. The regulations and forms so referred to and incorporated herein by reference are the following:

"(a) Regulations No. 38 relating to the capital stock tax under the revenue act of September 8, 1916, promulgated October 19, 1916.

(b) Regulations No. 38 (revised) relating to the capital stock tax under the revenue act of September 8, 1916, promulgated August 9, 1918.

(c) Regulations No. 50 relating to the capital stock tax under the revenue act of 1918, promulgated April 29, 1919.

(d) Regulations No. 50 (revised) relating to the capital stock tax under the revenue act of 1918, promulgated June 21, 1920.

(e) Regulations No. 64 relating to the capital stock tax under the revenue act of 1921, promulgated June 15, 1922.

(f) Form 707, revised June, 1918."

(20) Claimant filed its capital stock tax return on official Form 707, revised June, 1920, which said form contained certain instructions on page 4 theerof. The instructions so contained thereon are set out fully in the copy of said Form 707 attached to this agreed statement of facts as Exhibits No. (1) and No. (2) and the said instructions are hereby referred to and made a part of this agreed statement of facts.

(21) No other action than as aforesaid has been had on this claim in Congress or by any of the departments. The petitioner [fol. 54] has at all times borne true allegiance to the Government of the United States. It has not in any way voluntarily aided, abetted, or given encouragement to rebellion against such Government. It is and always has been the sole and absolute owner of the claim here presented. It has made no transfer or assignment of said claim or of any part thereof or of any interest therein.

[fol. 55] [File endorsement omitted.]

[fol. 56] [File endorsement omitted.]

Endorsed on cover: File No. 30,408. Court of Claims. Term No. 443. Ray Consolidated Copper Company, appellant, vs. The United States. Filed June 12th, 1924. File No. 30,408.

TREASURY DEPARTMENT,
U. S. INTERNAL REVENUE.
Form 707—Revised June, 1920.

TO BE STAMPED BY COLLECTOR SHOWING DISTRICT AND DATE RECEIVED

1921 RETURN
CAPITAL STOCK TAX

RETURN FOR DOMESTIC CORPORATIONS

(SEC. 300, TITLE X, REVENUE ACT OF 1921)

File with Collector of Internal Revenue for your district on or before July 31, 1920, to avoid penalty.

2...New York
(Collection district.)
Assessment List, Form 23 A.

(Month.) (Year.)

(Page.) (Line.)

Audited by:

1. Name RAY CONSOLIDATED COPPER COMPANY *Exhibit No 1.*
(Print name of corporation, joint-stock company or association.) (Show former name if changed.)
2. Address 25 Broad Street, New York City
(The address must be that of the principal place of business. Give "Street and number," "City or town," and "State.")
3. Name of parent company Ray & Gila Valley Railroad Co.-and
4. Name of subsidiary Ray Electric & Telephone Co. (District filed
(Or attach list and state districts where filed.)
5. Nature of business in detail Mining and Milling Copper ores
6. Incorporated or organized in State of Maine Date of incorporation or organization June 4,1907
7. Return as of close of fiscal year ended ~~June 30, 1920,~~ or Dec.31,1919 (Nearest earlier date.) Fire insurance carried, as of date, line 7, $ (Or state not applicable.)
(See Special Instructions No. 2, page 4 hereof.)

DO NOT PASTE RIDERS TO FACE OF RETURN.

	Cum. or noncum.	Dividend rate.	Number of shares.	Par value per share.	Total par value.	Total.
Capital stock outstanding:						
8. Common Non-Cum.		%	1577179	$10	$15 771 790 00	xxx xx xxx xx
9. First preferred		%				xxx xx xxx xx
10. Second preferred		%				xxx xx xxx xx
11. Total						$15 771 790 00
12. Amount of surplus From Securities						1 506 646 11
13. Amount of undivided profits Surplus from Operations						14 929 732 27
14. GRAND TOTAL						32 208 168 38

TAX PAYABLE ANNUALLY IN ADVANCE

RETURN FOR TAXABLE PERIOD JULY 1, 1920, TO JUNE 30, 1921, BASED ON FAIR AVERAGE VALUE OF CAPITAL STOCK FOR PRECEDING YEAR

CAREFULLY READ ALL INSTRUCTIONS BEFORE MAKING RETURN

COMPUTATION OF TAX.	This column for use of taxpayer.	This column for use of Department.
15. Domestic corporations will report: Fair value of total capital stock for fiscal year determined by Exhibit "B"	$ 34 803 608 99	$
Domestic mutual insurance companies will report:		
16. (a) Sum of surplus or contingent reserves maintained for general use of the business	$	$
(b) Plus any reserves the net additions to which are included in net income under the provisions of Title II, Revenue Act of 1918		
17. Total	34 803 608 99	
18. Deduction allowed by law	5 000 00	5 000 00
19. Amount in excess of $5,000	34 798 608 99	
20. Tax at rate of $1 for each full $1,000 in excess of $5,000		
21. Penalty		
22. TOTAL TAX AND PENALTY	34 798 00	

CLAIM SETTLEMENT RECORD

AMOUNT $
ALLOWED $
REJECTED $
FAIR VALUE $
BASIS

Every corporation must file a return or submit conclusive evidence that it is not liable. Determination of liability rests with the Commissioner. This applies to companies claiming exemption on account of not being engaged in business or as personal service corporations, etc., under Section 231, Title II, of the Revenue Act of 1918. See Arts. 28 and 31, Regulations 50, Revised.

ADDITIONAL ASSESSMENT RECORD

, 19 LIST
PAGE LINE
ADDITIONAL TAX, $
BY

60
60

ALL TAXES ARE PAYABLE TO THE COLLECTOR OF THE DISTRICT IN WHICH RETURN IS FILED.

(SEE INSTRUCTIONS ON PAGE 4.)

42—9648

EXHIBIT A. (See Special Instructions No. 4, page 4.)

CONDENSED BALANCE SHEET AS OF December 31, 1919
(Same date as Item 7, page 1.)

BANKS AND INSURANCE COMPANIES MAY ATTACH PRINTED STATEMENTS.

DEBITS AND ASSETS.	BOOKS OF ACCOUNT.	FAIR VALUE.	DIFFERENCE. * (Explain any large amounts.)
~~Real estate~~ Property	$ 8 657 620 28	$	$
Buildings Constr'n.&Equip't	8 722 509 49		
Machinery			
Securities	2 809 824 72		
Cash	1 813 633 98		
Notes receivable			
Accounts receivable	553 437 97		
Inventory	7 540 692 27		
Other assets			
Prepaid Ins.,etc.	61 997 41		
Good will, patents, etc.			
Deferred charges	6 137 521 83		
TOTALS	$36 397 237 95	$	$

CREDITS AND LIABILITIES.	BOOKS OF ACCOUNT.	FAIR VALUE.	DIFFERENCE.
Bonded debt $			
Less in Treas.	$	$	$
Mortgages			
Accounts payable	189 556 48		
Notes payable			
Other liabilities Treatment chgs.	433 309 79		
Reserves			
Depreciation	2 475 437 79		
Depletion			
Taxes			
Deferred credits	1 090 765 51		
	4 189 069 57		
Capital stock:			
Preferred $			
Less in Treas.			
Common $ 16000000			
Less in Treas. 228210	15 771 790 00		
Surplus From Securities	1 506 646 11		
Profit and loss	14 929 732 27		
TOTALS	$36 397 237 95	$	$

RECAPITULATION OF EXHIBIT A.	This column for use of taxpayer.	This column for use of Department.
DOMESTIC CORPORATIONS.		
Total of debits and assets *after deducting items not actual assets*	$ 36 397 237 95	$
Less total of credits and liabilities *after deducting capital stock, surplus, and other items not actual liabilities*	4 189 069 57	
STOCK INSURANCE COMPANIES.		
Fair value of assets		
Less actual liabilities and reserves, including deposits		
Difference (value of total capital stock reflected by Exhibit A)	$ 32 208 168 38	$

* Material differences will not be allowed unless satisfactorily explained.

(SEE INSTRUCTIONS ON PAGE 4.)

The fair value of the Capital Stock determined by Exhibit "B" is used for the computation of the tax since such sales, made in substantial volume in a free and open market, represent the "fair average value of the Capital Stock for the preceding year." The law makes this the measure of the tax and this corporation respectfully urges that a calculation, such as is made in Exhibit "B", based upon bona fide transactions on a large scale in an open market, establishes the value of its Capital Stock for the purpose of this tax.

The book figures as stated on Exhibit "A" do not include the valuation used as the basis of depletion in computing Federal Income Taxes. This valuation as determined by the Department was as of March 1, 1913, and the conditions existing at that date were materially different from those which existed during the year just closed. Such valuation also was under a different statute reading "the fair market value of the property." For these reasons, as well as because of the better basis furnished by Exhibit "B", the valuation placed on the property for the purpose of depletion is not used as a basis for the Capital Stock Tax.

In stating the net income in Exhibit "C" the figures for the years 1915, 1916 and 1917 have been stated on the basis of the taxable income for those years as restated by the Department as a result of its audit of the Company's tax returns.

In the column headed "Deductions" the amounts stated are the amounts of taxes (Income and Excess Profits) as now assessed or reassessed by the Department. In 1918 there were also donations to Red Cross and War Work Funds which are not deductible on the tax returns.

The additions consist of non-taxable income.

The resulting balance is stated as Adjusted Income although such adjusted income exceeds the income shown by the books for those years by the amount of disallowances made by the Department.

The average annual income as thus determined is shown as capitalized at 12% which we believe to be a fair return to be figured for property of this class under the conditions which existed during the past year. During the year Government tax-exempt bonds have been selling at a 5% to 6% basis, high grade industrial bonds have been selling on a 7% to 8% basis, and it is therefore believed that a fair return on the stock of this Company under such conditions would be not less than 12%.

This gives substantially the same valuation as that shown in Exhibit "B". As Exhibit "B" reflects more accurately "the fair average value of the Capital Stock for the preceding year" as contemplated by the Capital Stock Tax Law, the return herewith is presented on the basis of the valuation there shown.

In addition to the "Dividends Declared" in 1917 of $3.70 there was a "Capital Distribution" of 50¢ per share. In 1919 there were Capital Distributions of $2.00 per share.

EXHIBIT B. (See Special Instructions No. 5, page 4.)

QUOTATIONS OR OUTSIDE SALES PRICES New York Stock Exchange
(Give name of exchange or specify "Outside sales.")
Mean of high and low sales each month

MONTH.	COMMON. Number of shares outstanding.	COMMON. Price.	FIRST PREFERRED. Number of shares outstanding.	FIRST PREFERRED. Price.
January	1577179	$ 20.875		$
February	"	20.000		
March	"	19.625		
April	"	20.875		
May	"	21.500		
June	"	23.6875		
July	"	25.9375		
August	"	24.1875		
September	"	23.4375		
October	"	23.000		
November	"	21.000		
December	"	20.6875		
Total		264.8125		
Average	xxxxxx	22.0677	xxxxxx	

SPECIAL INFORMATION.

Manufacturing and trading corporations will report annual gross sales for the five preceding years shown under Exhibit C.

FISCAL YEAR ENDED—	SALES.
191	$
191	
191	
191	
19	

RECAPITULATION OF EXHIBIT B.

	This column for use of taxpayer.	This column for use of Department.
Average sale value of common stock per share, $22.0677, multiplied by 1577179 number of shares outstanding	$ 34 803 608 99	$
Average sale value of first preferred stock per share, $, multiplied by number of shares outstanding		
Average sale value of second preferred stock per share, $, multiplied by number of shares outstanding		
TOTAL (value of total capital stock reflected by Exhibit B)	34 803 608 99	

Approximate number of shares traded in during the year: Common _____ Preferred _____
Capital stock outstanding as of June 30, 1920: Common _____ Preferred _____

EXHIBIT C. (See Special Instructions No. 6, page 4.)

ANNUAL INCOME.

FISCAL YEAR Ended—	NET INCOME. (Deficit in red.)	DEDUCTIONS.	ADDITIONS.	ADJUSTED INCOME.	NUMBER OF SHARES.	DIVIDENDS DECLARED. Common.	DIVIDENDS DECLARED. First preferred.	DIVIDENDS DECLARED. Second preferred.	DEPRECIATION.
191 5	$3 754 758 35	$	$	$3 754 758 35		1.25 %	%	%	301 936 70
191 6	9 550 169 52	191 003 38		9 359 166 14		2.75 %	%	%	367 737 76
191 7	8 107 852 31	1 719 097 55		6 388 754 76		5.70 %	%	%	408 034 43
191 8	2 336 392 18	425 399 33	281 972 88	2 192 965 73		5.26 %	%	%	413 230 54
19 9	997 215 75	844 38	222 762 50	319 133 87		- %	%	%	
Total	23 846 388 11	2 336 344 64	504 735 38	22 014 778 85		10.95			1 490 939 43
Average	$4 769 277 62	xxxxxx	xxxxxx	$4 402 955 77		2.19 %	%	%	298 187 88

RECAPITULATION OF EXHIBIT C.

	This column for use of taxpayer.	This column for use of Department.
Average annual income as adjusted	$ 4 402 955 77	$
Capitalized at 12 per cent (value of total capital stock reflected by Exhibit C)	36 691 298 08	

STATE OF New York
COUNTY OF New York } ss.

We, Charles Hayden, Vice, President, and C. W. Jenkins, Asst., Treasurer, of the above-named company, whose return for special excise tax is herein set forth, being severally duly sworn, each for himself, deposes and says that the items entered in the foregoing report and in any additional list or lists attached to or accompanying this return are, to his best knowledge and belief and from such information as he has been able to obtain, true and correct.

Sworn to and subscribed before me this 30th day of July, 19 20

(Sgd) Charles Finkler
Notary Public
(Official capacity.)

(Sgd) Charles Hayden,
Vice President.

(Sgd) C. W. Jenkins
Asst. Treasurer.

(See Instructions on Page 4.)

SPECIAL INSTRUCTIONS

1. REQUIRED VALUE.—The capital stock tax except on domestic mutual insurance companies is measured by the fair value of the total capital stock for the year preceding the taxable year, whether or not it is organized for profit or has a capital stock represented by shares. For domestic mutual insurance companies, see page 1, Form 707, Revised.

For the purpose of this tax the fair value of the entire capital stock as a going concern, regardless of stock ownership or the ability of individual stockholders to liquidate their holdings, is required. The sales prices for any number of shares of stock less than a majority interest are not necessarily indicative of the fair value of the entire capital stock. The book value, the kind of assets (slow or quick turning), the nature of the business, good will, franchises, earning capacity, etc., are important factors that affect the worth of enterprises and must be given due consideration in arriving at the fair value at any given date.

In order that consideration may be given the various factors affecting fair value, three exhibits are provided for furnishing information, and the taxpayer will complete each exhibit or state why the required data are not available.

Exhibit A provides for adjusting any overstated or understated values contained in the taxpayer's books of account, and Exhibit C provides for showing an adjusted income, which should be the actual operating income to be used for capitalizing on a percentage basis fixed by its officers as fairly representing conditions obtaining in the trade and in the locality. If the reconstructed book value shown by Exhibit A or the market value shown by Exhibit B is greater than the valuation returned by the taxpayer, a comprehensive statement showing any extraordinary conditions which are relied on in support of the valuation claimed must be submitted. In any case in which the fair value is understated the amount will be redetermined by the Commissioner and the correct tax assessed; also any penalty incurred will be asserted.

2. CLOSING DATE OF FISCAL YEAR.—In item 7, on page 1 hereof, the taxpayer will show the closing date of its fiscal year ended between July 1, 1919, and June 30, 1920, if other than June 30, and the information furnished under Exhibits A, B, and C will be as of the year or years ended on such date, which should be used annually.

Mutual insurance companies will show June 30 or the nearest earlier date of the closing of the preceding accounting period used by such company for purpose of making its income-tax return.

3. EXHIBITS.—The three exhibits, A, B, and C, are provided to indicate the information desired and the manner in which it should be furnished. So far as adaptable these forms should be completed by taxpayers, but if they find it more convenient they may attach to this return their own statements (as in the case of banks and insurance companies), provided substantially the same information is furnished. In any event, taxpayers should attach any additional statements that will aid in a comprehensive understanding of the taxpayer's return, so that the Commissioner of Internal Revenue may equitably determine the correctness of the fair value reported in item 17 on page 1 hereof.

4. EXHIBIT A: CONDENSED BALANCE SHEET.—Furnish under Exhibit A a condensed balance sheet as of the closing date of the fiscal year given in item 7 on page 1 hereof.

"Books of account."—These columns must show the amounts as carried in the taxpayer's books of account.

"Fair value."—Refer to article 1 above, defining the value required, and in the event that the columns "Books of account" contain any overstated or understated values, show herein the actual values.

"Difference."—These columns will show the difference between the columns "Books of account" and "Fair value." Any material differences *must be explained* in such manner as to enable the Commissioner of Internal Revenue to determine if they are proper and acceptable. For this purpose the differences shown herein need not be covered by corresponding adjustments in the taxpayer's books of account.

"Treasury stock" and "Treasury bonds."—In the event the taxpayer holds in its treasury any of its own stock or bonds, advice must be furnished as to whether such stock and bonds are pledged or unpledged.

"Other assets" and "Other liabilities."—If material amounts are shown, a comprehensive analysis of them must be attached.

"Profit and loss."—If the "Profit and loss" balance is a debit, the amount should be shown in red.

Reserves for the payment of future dividends, whether declared or not, will not be considered as liabilities, but a reasonable amount to cover the preceding dividend period may be so considered if the dividend has been declared and not disbursed.

5. EXHIBIT B: QUOTATIONS OR OUTSIDE SALES PRICES.—Furnish under Exhibit B the prices quoted on a recognized stock exchange or on the New York curb, or the prices at which outside sales were made if the stock is not listed, for the period of 12 months ending with the close of the taxpayer's fiscal year given in item 7 on page 1 hereof.

If the stock is listed, the name of the exchange from which reported quotations are taken must be shown in the space provided therefor, and the prices reported will be the mean of the highest and of the lowest bid price during each month, from which the average for the year will be obtained. If the taxpayer prefers, a schedule may be attached to this return showing the highest and lowest bid price at which stock was quoted for each day of the year and the average obtained therefrom.

If the stock is not listed and outside sales have been made at prices known or determinable by the officers making this report, such prices will be reported herein. A statement of the number of shares involved and the conditions under which sales were made at other than exchange quotations must accompany this return. Sales to employees or directors for qualifying purposes, or sales which are restricted as to resale, or sales at prices otherwise specially influenced, will not be considered representative of the fair value of the entire capital stock and should not be included.

In the column "Number of shares outstanding" should be shown the total number of shares outstanding at the close of each month. The average value per share will be determined as follows:

First. If no change occurred in the number of shares outstanding during the year, total the quotations or sales prices for the months reported and divide by the number of months in which quotations or sales prices are shown.

Second. If any change occurred in the number of shares outstanding during the year, total the quotations or sales prices for the months reported during which the number of shares outstanding at date of incidence of the tax has been outstanding and divide by the number of months used in the computation.

6. EXHIBIT C: ANNUAL INCOME.—Furnish under Exhibit C the annual income and other data for the five fiscal years ended with the close of the taxpayer's fiscal year as given in item 7 on page 1 hereof, or for the period during which the corporation has been engaged in business if for a shorter period.

"Net income."—In this column will be shown the income returned for the purpose of the income tax and excess profits tax.

"Deductions" and "Additions."—Refer to article 1 of these Special Instructions, and show in these columns such amounts as should be deducted from or added to "Net income" to arrive at the adjusted income which may be capitalized to determine the fair value of the capital stock. A comprehensive analysis of any amounts reported therein should be attached to this return. Some of the principal items frequently requiring adjustment are:

Deductions:
- Income and profits taxes not deductible in computing income subject to tax.
- Depreciation and depletion.
- Interest charges not deductible in computing income subject to tax.
- Losses not fully deductible, in computing income subject to tax.

Additions:
- Dividends from other corporations not included in computing income subject to tax.
- Income from securities of a State, municipality, or of the United States, not included in the income-tax return.
- Expenditures made for additions and betterments, or reserves for such purposes, made against income, whether direct or through expenses.

"Adjusted income."—This column will reflect the amounts resulting from the adjustment of the amounts shown in the three preceding columns.

"Number of shares."—Herein should be given the total number of shares of all classes of stock outstanding at the close of each fiscal year.

"Dividends declared."—Herein should be reported the percentage of dividends declared on the par value of each class of stock outstanding each year. The amount represented by the percentages shown in this column must not be deducted from the columns "Net income" or "Adjusted income."

"Depreciation."—Hereunder will be reported the amount actually charged against income each year in the taxpayer's books of account for depreciation.

"Depletion."—In the case of mines, oil and gas wells, other natural deposits, and timber, valuations reported as the basis of depletion in computing Federal income and profits taxes should be shown in the "Fair value" column.

Capitalizing net income.—The officers making the return will capitalize the average annual income on a percentage basis that fairly represents, under the conditions obtaining in the trade in the locality, what representative enterprises must earn in order to maintain their stock at par. In other words, if enterprises engaged in a similar business must on the average earn 12 per cent on their issued capital stock to keep the value of their stock at par, the net income should be capitalized by dividing it by .12.

7. Domestic insurance companies (other than mutual companies) must attach to the return a list of such deposits and reserve funds as they are required by law or contract to maintain or hold for the protection of or payment to or apportionment among policyholders, stating the name and amount of each such deposit or fund.

8. Domestic mutual insurance companies must attach to the return a supplementary list showing the name and amount of each reserve, the net additions to which are included in the net income.

GENERAL INSTRUCTIONS

1. NATURE OF TAX.—The capital stock tax due July 1, 1920, is an excise tax payable in advance for the privilege of doing business from July 1, 1920, to June 30, 1921.

2. DATE OF FILING RETURNS.—During the month of July and annually thereafter.

3. TENTATIVE RETURN.—Filing of a tentative return will avoid penalty for delinquent filing, but does not authorize withholding of the tax. Complete return as far as possible and submit an approximate estimate as a basis in order that an initial assessment may be made. See Art. 34, Reg. 50, Revised.

4. THE COLLECTOR MAY MAKE RETURN.—If any corporation or association fails to make and file a return within the time prescribed by law or by regulation made under authority of law, or makes, willfully or otherwise, a false or fraudulent return, the collector or his deputy is authorized to make the return from such information as he can obtain through testimony or otherwise. Such return, when subscribed by the collector or his deputy, shall be prima facie good and sufficient for all legal purposes.

5. EXTENSION OF TIME.—If on account of sickness or absence of the officer charged with making the return it is impossible to prepare and file a return on or before July 31, the collector, upon application in writing, may allow an extension of not exceeding 30 days for making and filing the return. If extension is granted, the letter of the collector should be attached to the return.

6. SIGNATURES AND VERIFICATION.—Returns must be signed and verified by two officers of the corporation, that is, by the president, vice president, or other principal officer, and by the treasurer or other financial officer, and must be sworn to before an officer authorized to administer oaths, and the seal of the attesting officer, if he is required to have a seal, must be impressed on the return. The name of the corporation and the names of the officers signing the return should be plainly written or printed on the return.

7. TAX.—From the total fair average value of the capital stock the sum of $5,000 is deductible and the tax is at the rate of $1 for each full $1,000 of any balance except in the case of mutual insurance companies (see lines 16 to 20 on page 1).

8. PENALTIES.—In case of any failure to make and file a return or list within the time prescribed by law, or prescribed by the Commissioner of Internal Revenue or the collector in pursuance of law, the Commissioner of Internal Revenue shall add to the tax 25 per centum of its amount, except that when a return is filed after such time and it is shown that the failure to file it was due to a reasonable cause and not to willful neglect, no such addition shall be made to the tax. In case a false or fraudulent return or list is willfully made, the Commissioner of Internal Revenue shall add to the tax 50 per centum of its amount. The amount of the tax is payable to the collector at any time after July 1, 1920, but penalties for nonpayment do not attach until ten days after notice and demand has been served by the collector upon the taxpayer.

9. REGULATIONS.—For further information regarding the tax see Regulations No. 50, Revised.

2nd ... New York

1920 RETURN

CAPITAL STOCK TAX

RETURN FOR DOMESTIC CORPORATIONS

... Collector of Internal Revenue for your district on or before July 31, 1920, to avoid penalty.

Exhibit No. 2.

RAY CONSOLIDATED COPPER COMPANY

25 Broad Street, New York City

Ray & Gila Valley Railroad Co. - and
Ray Electric & Telephone Co.

Mining and Milling Copper Ores

Maine

June 4, 1907

Dec. 31, 1919

R 19048

69,798.07

69,798.07

69,910.000

Non-Cum. 1577179.16. 15 771 790

Fair value of assets materially less than the net fair value of the assets S.E.

	15 771 790 00
From Securities	1 506 646 11
Surplus from Operations	14 929 732 27
	32 208 168 38

A 5384 B

69,107.00

69,107.00 "B"

69,107.000

103,910.000

Fair net value of the assets S.E.

	34 803 608 99
	34 803 608 99
MAY 31 1922	34 798 608 99 ✓
	34 798 00

EXHIBIT A

CONDENSED BALANCE SHEET AS OF December [illegible]

	BOOKS OF ACCOUNT	FAIR VALUE	DIFFERENCE*
[illegible] Property	$ 8 657 620 28		
[illegible] Constr'n & Equip't	8 722 809 49		
[illegible]	2 809 824 72		
[illegible]	1 813 633 98		
[illegible]	653 437 97		
[illegible]	7 540 698 27		
[illegible] Ins., etc.	61 997 41		
[illegible]	6 137 521 83		
[illegible]	$ 36 397 237 95		$

	BOOKS OF ACCOUNT	FAIR VALUE	DIFFERENCE
[illegible]	189 858 48		
[illegible] chgs.	433 309 79		
[illegible]	2 475 437 79		
[illegible]	1 090 705 51		
[illegible]	4 189 069 57		
[illegible] 15000000			
[illegible] 228210	15 771 790 00		
[illegible] from Securities	1 506 646 11		
[illegible]	14 929 752 27		
[illegible]	36 397 237 95		$

VERIFICATION OF EXHIBIT A

	This column for use of taxpayer	This column for use of Department
Total of debits and assets *after deducting items not actual assets*	$ 36 397 237 95	
Total of credits and liabilities *after deducting capital stock, surplus, and other items not liabilities*	4 189 069 57	
[illegible]	$ 32 208 168 38	

*[illegible] will not be allowed unless satisfactorily explained.

[illegible]	[illegible]	20.875
[illegible]	"	[illegible]
[illegible]	"	[illegible]
[illegible]	"	[illegible]
[illegible]	"	[illegible]
[illegible]	"	[illegible]
[illegible]	"	[illegible]
[illegible]	"	24.1[illegible]
[illegible]ber	"	23.4375
[illegible]	"	22.000
[illegible]ber	"	21.000
[illegible]ber	"	20.0375
		[illegible]
		22.[illegible]

34 803 608 99

34 803 608 99

EXHIBIT C. — See Special Instructions No. 6, par. [illegible]

ANNUAL INCOME.

	INCOME	DEDUCTIONS	ADDITIONS	ADJUSTED INCOME	NUMBER OF SHARES	DIVIDENDS DECLARED Common	[illegible]	[illegible]
[illegible]	[illegible]475835			3754 75835	1.25			[illegible]
[illegible]	[illegible]016952	191003 56		9359 16614	2.75			
[illegible]	[illegible]	179097 5[illegible]		[illegible] 75475	[illegible].70			
[illegible]	[illegible]	425399 [illegible]	[illegible]197288	2192 96573	3.[illegible]			[illegible]
[illegible]	[illegible]1375	[illegible]	[illegible]	319 13387	-			
[illegible]	[illegible]	[illegible]	[illegible]	22014 77855	10.95		1	
	[illegible]			4402 955[illegible]	[illegible].19		[illegible]	[illegible]

4 402 956 77

3[illegible] [illegible] 298 08

[illegible] C. V. Jenkins, Asst.

SPECIAL INSTRUCTIONS

1. REQUIRED VALUE.—The capital stock tax except on domestic mutual insurance companies is measured by the fair value of the total capital stock for the year preceding the taxable year, whether or not it is organized for profit or has a capital stock represented by shares. For domestic mutual insurance companies, see page 1, Form 707, Revised.

For the purpose of this tax the fair value of the entire capital stock as a going concern, regardless of stock ownership or the ability of individual stockholders to liquidate their holdings, is required. The sales prices for any number of shares of stock less than a majority interest are not necessarily indicative of the fair value of the entire capital stock. The book value, the kind of assets (slow or quick turning), the nature of the business, good will, franchises, earning capacity, etc., are important factors that affect the worth of enterprises and must be given due consideration in arriving at the fair value at any given date.

In order that consideration may be given the various factors affecting fair value, three exhibits are provided for furnishing information, and the taxpayer will complete each exhibit or state why the required data are not available.

Exhibit A provides for adjusting any overstated or understated values contained in the taxpayer's books of account, and Exhibit C provides for showing an adjusted income, which should be the actual operating income to be used for capitalizing on a percentage basis fixed by its officers as fairly representing conditions obtaining in the trade and in the locality. If the reconstructed book value shown by Exhibit A or the market value shown by Exhibit B is greater than the valuation returned by the taxpayer, a comprehensive statement showing any extraordinary conditions which are relied on in support of the valuation claimed must be submitted. In any case in which the fair value is understated the amount will be redetermined by the Commissioner and the correct tax assessed; also any penalty incurred will be asserted.

2. CLOSING DATE OF FISCAL YEAR.—In item 7, on page 1 hereof, the taxpayer will show the closing date of its fiscal year ended between July 1, 1919, and June 30, 1920, if other than June 30, and the information furnished under Exhibits A, B, and C will be as of the year or years ended on such date, which should be used annually.

Mutual insurance companies will show June 30 or the nearest earlier date of the closing of the preceding accounting period used by such company for purpose of making its income-tax return.

3. EXHIBITS.—The three exhibits, A, B, and C, are provided to indicate the information desired and the manner in which it should be furnished. So far as adaptable these forms should be completed by taxpayers, but if they find it more convenient they may attach to this return their own statements (as in the case of banks and insurance companies), provided substantially the same information is furnished. In any event, taxpayers should attach any additional statements that will aid in a comprehensive understanding of the taxpayer's return, so that the Commissioner of Internal Revenue may equitably determine the correctness of the fair value reported in item 17 on page 1 hereof.

4. EXHIBIT A: CONDENSED BALANCE SHEET.—Furnish under Exhibit A a condensed balance sheet as of the closing date of the fiscal year given in item 7 on page 1 hereof.

"Books of account."—These columns must show the amounts as carried in the taxpayer's books of account.

"Fair value."—Refer to article 1 above, defining the value required, and in the event that the columns "Books of account" contain any overstated or understated values, show herein the actual values.

"Difference."—These columns will show the difference between the columns "Books of account" and "Fair value." Any material differences *must be explained* in such manner as to enable the Commissioner of Internal Revenue to determine if they are proper and acceptable. For this purpose the differences shown herein need not be covered by corresponding adjustments in the taxpayer's books of account.

"Treasury stock" and "Treasury bonds."—In the event the taxpayer holds in its treasury any of its own stock or bonds, advice must be furnished as to whether such stock and bonds are pledged or unpledged.

"Other assets" and "Other liabilities."—If material amounts are shown, a comprehensive analysis of them must be attached.

"Profit and loss."—If the "Profit and loss" balance is a debit, the amount should be shown in red.

Reserves for the payment of future dividends, whether declared or not, will not be considered as liabilities, but a reasonable amount to cover the preceding dividend period may be so considered if the dividend has been declared and not disbursed.

5. EXHIBIT B: QUOTATIONS OR OUTSIDE SALES PRICES.—Furnish under Exhibit B the prices quoted on a recognized stock exchange or on the New York curb, or the prices at which outside sales were made if the stock is not listed, for the period of 12 months ending with the close of the taxpayer's fiscal year given in item 7 on page 1 hereof.

If the stock is listed, the name of the exchange from which reported quotations are taken must be shown in the space provided therefor, and the prices reported will be the mean of the highest and of the lowest bid price during each month, from which the average for the year will be obtained. If the taxpayer prefers, a schedule may be attached to this return showing the highest and lowest bid price at which stock was quoted for each day of the year and the average obtained therefrom.

If the stock is not listed and outside sales have been made at prices known or determinable by the officers making this report, such prices will be reported herein. A statement of the number of shares involved and the conditions under which sales were made at other than exchange quotations must accompany this return. Sales to employees or directors for qualifying purposes, or sales which are restricted as to resale, or sales at prices otherwise specially influenced, will not be considered representative of the fair value of the entire capital stock and should not be included.

In the column "Number of shares outstanding" should be shown the total number of shares outstanding at the close of each month. The average value per share will be determined as follows:

First. If no change occurred in the number of shares outstanding during the year, total the quotations or sales prices for the months reported and divide by the number of months in which quotations or sales prices are shown.

Second. If any change occurred in the number of shares outstanding during the year, total the quotations or sales prices for the months reported during which the number of shares outstanding at date of incidence of the tax has been outstanding and divide by the number of months used in the computation.

6. EXHIBIT C: ANNUAL INCOME.—Furnish under Exhibit C the annual income and other data for the five fiscal years ended with the close of the taxpayer's fiscal year as given in item 7 on page 1 hereof, or for the period during which the corporation has been engaged in business if for a shorter period.

"Net income."—In this column will be shown the income returned for the purpose of the income tax and excess profits tax.

"Deductions" and "Additions."—Refer to article 1 of these Special Instructions, and show in these columns such amounts as should be deducted from or added to "Net income" to arrive at the adjusted income which may be capitalized to determine the fair value of the capital stock. A comprehensive analysis of any amounts reported therein should be attached to this return. Some of the principal items frequently requiring adjustment are:

Deductions:
- Income and profits taxes not deductible in computing income subject to tax.
- Depreciation and depletion.
- Interest charges not deductible in computing income subject to tax.
- Losses not fully deductible, in computing income subject to tax.

Additions:
- Dividends from other corporations not included in computing income subject to tax.
- Income from securities of a State, municipality, or of the United States, not included in the income-tax return.
- Expenditures made for additions and betterments, or reserves for such purposes, made against income, whether direct or through expenses.

"Adjusted income."—This column will reflect the amounts resulting from the adjustment of the amounts shown in the three preceding columns.

"Number of shares."—Herein should be given the total number of shares of all classes of stock outstanding at the close of each fiscal year.

"Dividends declared."—Herein should be reported the percentage of dividends declared on the par value of each class of stock outstanding each year. The amount represented by the percentages shown in this column must not be deducted from the columns "Net income" or "Adjusted income."

"Depreciation."—Hereunder will be reported the amount actually charged against income each year in the taxpayer's books of account for depreciation.

"Depletion."—In the case of mines, oil and gas wells, other natural deposits, and timber, valuations reported as the basis of depletion in computing Federal income and profits taxes should be shown in the "Fair value" column.

Capitalizing net income.—The officers making the return will capitalize the average annual income on a percentage basis that fairly represents, under the conditions obtaining in the trade in the locality, what representative enterprises must earn in order to maintain their stock at par. In other words, if enterprises engaged in a similar business must on the average earn 12 per cent on their issued capital stock to keep the value of their stock at par, the net income should be capitalized by dividing it by .12.

7. Domestic insurance companies (other than mutual companies) must attach to the return a list of such deposits and reserve funds as they are required by law or contract to maintain or hold for the protection of or payment to or apportionment among policyholders, stating the name and amount of each such deposit or fund.

8. Domestic mutual insurance companies must attach to the return a supplementary list showing the name and amount of each reserve, the net additions to which are included in the net income.

GENERAL INSTRUCTIONS

1. NATURE OF TAX.—The capital stock tax due July 1, 1920, is an excise tax payable in advance for the privilege of doing business from July 1, 1920, to June 30, 1921.

2. DATE OF FILING RETURNS.—During the month of July and annually thereafter.

3. TENTATIVE RETURN.—Filing of a tentative return will avoid penalty for delinquent filing, but does not authorize withholding of the tax. Complete return as far as possible and submit an approximate estimate as a basis in order that an initial assessment may be made. See Art. 34, Reg. 50, Revised.

4. THE COLLECTOR MAY MAKE RETURN.—If any corporation or association fails to make and file a return within the time prescribed by law or by regulation made under authority of law, or makes, willfully or otherwise, a false or fraudulent return, the collector or his deputy is authorized to make the return from such information as he can obtain through testimony or otherwise. Such return, when subscribed by the collector or his deputy, shall be prima facie good and sufficient for all legal purposes.

5. EXTENSION OF TIME.—If on account of sickness or absence of the officer charged with making the return it is impossible to prepare and file a return on or before July 31, the collector, upon application in writing, may allow an extension of not exceeding 30 days for making and filing the return. If extension is granted, the letter of the collector should be attached to the return.

6. SIGNATURES AND VERIFICATION.—Returns must be signed and verified by two officers of the corporation, that is, by the president, vice president, or other principal officer, and by the treasurer or other financial officer, and must be sworn to before an officer authorized to administer oaths, and the seal of the attesting officer, if he is required to have a seal, must be impressed on the return. The name of the corporation and the names of the officers signing the return should be plainly written or printed on the return.

7. TAX.—From the total fair average value of the capital stock the sum of $5,000 is deductible and the tax is at the rate of $1 for each full $1,000 of any balance except in the case of mutual insurance companies (see lines 16 to 20 on page 1).

8. PENALTIES.—In case of any failure to make and file a return or list within the time prescribed by law, or prescribed by the Commissioner of Internal Revenue or the collector in pursuance of law, the Commissioner of Internal Revenue shall add to the tax 25 per centum of its amount, except that when a return is filed after such time and it is shown that the failure to file it was due to a reasonable cause and not to willful neglect, no such addition shall be made to the tax. In case a false or fraudulent return or list is willfully made, the Commissioner of Internal Revenue shall add to the tax 50 per centum of its amount. The amount of the tax is payable to the collector at any time after July 1, 1920, but penalties for nonpayment do not attach until ten days after notice and demand has been served by the collector upon the taxpayer.

9. REGULATIONS.—For further information regarding the tax see Regulations No. 50, Revised.

The fair value of the Capital Stock determined by Exhibit "B" is used for the computation of the tax since such sales, made in substantial volume in a free and open market, represent the "fair average value of the Capital Stock for the preceding year." The law makes this the measure of the tax and this corporation respectfully urges that a calculation, such as is made in Exhibit "B", based upon bona fide transactions on a large scale in an open market, establishes the value of its Capital Stock for the purpose of this tax.

The book figures as stated on Exhibit "A" do not include the valuation used as the basis of depletion in computing Federal Income Taxes. This valuation as determined by the Department was as of March 1, 1913, and the conditions existing at that date were materially different from those which existed during the year just closed. Such valuation also was under a different statute reading "the fair market value of the property." For these reasons, as well as because of the better basis furnished by Exhibit "B", the valuation placed on the property for the purpose of depletion is not used as a basis for the Capital Stock Tax.

In stating the net income in Exhibit "C" the figures for the years 1915, 1916 and 1917 have been stated on the basis of the taxable income for those years as restated by the Department as a result of its audit of the Company's tax returns.

In the column headed "Deductions" the amounts stated are the amounts of taxes (Income and Excess Profits) as now assessed or reassessed by the Department. In 1918 there were also donations to Red Cross and War Work Funds which are not deductible on the tax returns.

The additions consist of non-taxable income.

The resulting balance is stated as Adjusted Income although such adjusted income exceeds the income shown by the books for those years by the amount of disallowances made by the Department.

The average annual income as thus determined is shown as capitalized at 12% which we believe to be a fair return to be figured for property of this class under the conditions which existed during the past year. During the year Government tax-exempt bonds have been selling at a 5% to 6% basis, high grade industrial bonds have been selling on a 7% to 8% basis, and it is therefore believed that a fair return on the stock of this Company under such conditions would be not less than 12%.

This gives substantially the same valuation as that shown in Exhibit "B". As Exhibit "B" reflects more accurately "the fair average value of the Capital Stock for the preceding year" as contemplated by the Capital Stock Tax Law, the return herewith is presented on the basis of the valuation there shown.

In addition to the "Dividends Declared" in 1917 of $3.70 there was a "Capital Distribution" of 50¢ per share. In 1919 there were Capital Distributions of $2.00 per share.

DOCKET No. 443.

DEC 15 1924

WM. R. STANSBURY
CLERK

Supreme Court of the United States,

OCTOBER TERM, 1924.

RAY CONSOLIDATED COPPER COMPANY, A CORPORATION,
Appellant,

against

UNITED STATES OF AMERICA.

BRIEF FOR APPELLANT.

ARTHUR A. BALLANTINE,
CARROLL A. WILSON,
GEORGE E. CLEARY,
Attorneys for Appellant.

The Evening Post Job Printing Office, Inc., 154 Fulton St., New York, N. Y.

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CITATIONS.

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Miscellaneous:

Supreme Court of the United States,

OCTOBER TERM, 1924.

RAY CONSOLIDATED COPPER COMPANY, a Corporation, Appellant, AGAINST THE UNITED STATES OF AMERICA.	No. 448.

BRIEF FOR APPELLANT.

This appeal presents for review the final decision of the United States Court of Claims dismissing on the merits appellant's petition for the refund of capital stock taxes.

The question at issue is the measure to be used for determining the capital stock tax on domestic corporations imposed by Section 1000, Title X, of the Revenue Act of 1918 (40 Stats. 1126). This section was considered by the Court in *Hecht* v. *Malley,* 265 U. S. 144 (1924), but the question here presented as to the measure of the tax was not presented or decided.

Under Section 1000 the tax on a domestic corporation is to be computed upon the *"fair average value of its capital stock for the preceding year ending June 30"*. The *shares* of stock of appellant were and are regularly dealt in on the New York Stock Exchange in substantial volume and had an established market price during the critical year. Appellant contends that these shares constituted the "capital stock" to be valued, and that the established market price is the most direct and persuasive evidence of the fair average value of the shares for the year. The Commissioner of Internal Revenue, however, measured the capital stock tax of appellant by the fair value of its *net assets* on December 31, 1919, giving no weight to the market value of the shares or to any facts except the value of the corporation's assets, and the Commissioner's action was approved below.

Statement of Case.

The appellant brought this action in the United States Court of Claims for the recovery of $69,798.07 additional capital stock tax and interest paid by it under protest for the taxable year ending June 30, 1921. The facts were stipulated. Before the case came to trial the Commissioner of Internal Revenue determined that $48,557.77 of the amount sued for should be refunded, and this was done. This action was then continued under amended pleadings as an action for the recovery of the unrefunded balance of $21,240.30. An amended statement of facts was agreed to by the parties. The Court below adopted the agreed facts as its findings of fact (omitting three exhibits) and there is no controversy as to the facts. Through error the Court below used the original stipulation of facts instead of the amended stipulation of facts as its findings. This mechanical error has been corrected by a stipulation printed in the transcript of record. The Court of Claims dismissed appellant's petition on the merits and filed a written opinion. This appeal is taken from that decision (Sec. 182, Judicial Code, pertaining to the Court of Claims, 36 Stats. 1142).

Since it has been necessary to print this brief before the transcript of record was printed the

references are to the findings of fact as numbered in the stipulation correcting the record.

The findings show the following facts:

The appellant was and is a domestic corporation engaged in the mining, milling and selling of copper and owning extensive deposits of low grade ore (Finding No. 2). For the taxable year ending June 30, 1921, it duly filed a capital stock tax return on form 707 prescribed by the Commissioner, setting forth information as to its assets and liabilities, sales of its shares of stock, its earnings, and the dividends paid. This report showed that during the critical year 537,938 shares of appellant's stock were bought and sold on the New York Stock Exchange at an average price of $22.067 per share. There were 1,577,179 shares of such stock outstanding during 1919 and 1920 and the value of such shares at $22.067 per share was $34,803,608.99. This was the amount reported by the appellant as the fair average value of its capital stock. The tax computed at $1 per $1,000 of such total value, amounting to $34,798, was duly paid (Findings 4 to 7).

The Commissioner of Internal Revenue refused to approve this determination of the tax. In February, 1922, he made an additional assessment of $69,107. This was based upon a determination of the *net fair value of the assets* owned by

the appellant on December 31, 1919. Appellant's capital stock tax return included as Exhibit A a statement of its assets and liabilities as required by the official form and a rider attached to the return specifically called attention to the fact that in said Exhibit A the mining property was included at $8,657,620.28, its book value based on *cost,* and that any valuations of such property for depletion purposes were omitted as immaterial. In determining the net fair value of the assets for the purposes of the additional assessment, the value of the mining property on December 31, 1919, was determined by the Commissioner by using its value as of March 1, 1913, theretofore determined by him for depletion purposes under the Income Tax Law ($93,678,-245.28),—a valuation as of such date less than that which the plaintiff had contended for—with an allowance for depletion sustained from March 1, 1913, to December 31, 1919, of $13,318,-384.31, resulting in a net value on December 31, 1919, for the mining property of $80,359,860.97, and in a net value for the total assets of $103,-910,409.07 (Finding 10). Appellant was notified of the additional assessment resulting from this change and the basis therefor by a letter from the Bureau of Internal Revenue dated February 23, 1922, which is set forth in Finding 11.

Appellant was required to pay and did pay

under protest the additional assessment of $69,107 with interest thereon of $691.07, and a claim for refund thereof was rejected in full on June 29, 1922 (Findings 14 and 15).

After the commencement of this action in the Court below the Commissioner of Internal Revenue reconsidered his decision on the claim for refund of the additional assessment of $69,107 and interest, and on November 9, 1923, refunded $48,077 of such additional tax and a proportionate part of the interest (Finding 16).

In making this refund the Commissioner adhered to his position that the capital stock tax should be based upon the net fair value of the Company's assets on December 31, 1913, and again adopted the excess of assets over liabilities as the fair value of the "capital stock". He modified his previous decision, however, by determining that the fair value of the mining property on December 31, 1919, was but $32,282,-993.56, and the total excess of assets over liabilities on that date but $55,833,541.66, a valuation less than the original valuation by $48,076,867.41. The Court below states in its opinion that this final valuation of the property was the 1913 valuation less an allowance for depletion from 1913 to 1919. It was in fact an entirely new valuation as of December 31, 1919 (Finding 16).

The appellant was advised of the basis for this

refund by a "Notice of adjustment of claim for refund" which is set forth in full in Finding 16.

The Commissioner of Internal Revenue at no time has determined, or purported to determine the "fair *average* value" of the capital stock of appellant. The amount finally determined by the Commissioner as the "fair value" of appellant's capital stock based directly and solely upon a valuation of the net corporate assets as of December 31, 1919, was $55,833,541.66. The only asset increased over the amount at which it was returned by the appellant was the mineral deposits. The amount reported by the appellant as the fair average value of its capital stock based on sales of shares thereof in substantial volume during the preceding year was $34,803,608.99. The tax attributable to the difference between these amounts is $21,030 which with $210.30 interest paid thereon is the full amount sued for.

Assignment of Errors.

1. The Court erred in dismissing appellant's petition and in refusing to grant the judgment demanded in said petition.

2. The Court erred in holding that the term "fair average value of its capital stock for the preceding year" as used in Section 1000 of the Revenue Act of 1918 means the value of the net assets of the corporation.

3. The Court erred in refusing to hold that the term "fair average value of its capital stock for the preceding year" as used in Section 1000 of the Revenue Act of 1918 means the value of the shares of capital stock of the corporation.

4. The Court erred in sustaining the assessment of capital stock tax made by the Commissioner of Internal Revenue in this case solely on the basis of the fair value of the net assets of the corporation.

5. The Court erred in refusing to hold that the capital stock tax of appellant should have been measured by the fair average value of its shares of capital stock for the preceding year.

6. The Court erred in refusing to hold that the fair average value of the shares of stock of appellant for the preceding year should be determined primarily by use of the sales of such shares dur-

ing such year in substantial volume on the open market.

7. The Court erred in holding that the Commissioner of Internal Revenue could properly disregard entirely the sales of appellant's shares in substantial volume on the open market during the preceding year and determine the capital stock tax of appellant solely on the basis of the fair value of appellant's net assets on a single date.

The Statute.

The provisions of Section 1000 of the Revenue Act of 1918 are as follows:

> "Sec. 1000. (*a*) That on and after July 1, 1918, in lieu of the tax imposed by the first subdivision of section 407 of the Revenue Act of 1916—
>
> (1) Every domestic corporation shall pay annually a special excise tax with respect to carrying on or doing business, equivalent to $1 for each $1,000 of so much of the fair average value of its capital stock for the preceding year ending June 30 as is in excess of $5,000. In estimating the value of capital stock the surplus and undivided profits shall be included;
>
> (2) Every foreign corporation shall pay annually a special excise tax with respect to carrying on or doing business in the United States, equivalent to $1 for each $1,000 of the average amount of capital employed in

the transaction of its business in the United States during the preceding year ending June thirtieth.

(*b*) In computing the tax in the case of insurance companies such deposits and reserve funds as they are required by law or contract to maintain or hold for the protection of or payment to or apportionment among policyholders shall not be included.

(*c*) The taxes imposed by this section shall not apply in any year to any corporation which was not engaged in business (or in the case of a foreign corporation not engaged in business in the United States) during the preceding year ending June 30, nor to any corporation enumerated in Section 231. The taxes imposed by this section shall apply to mutual insurance companies, and in the case of every such domestic company the tax shall be equivalent to $1 for each $1,000 of the excess over $5,000 of the sum of its surplus or contingent reserves maintained for the general use of the business and any reserves the net additions to which are included in net income under the provisions of Title II, as of the close of the preceding accounting period used by such company for purposes of making its income tax return: *Provided,* That in the case of a foreign mutual insurance company the tax shall be equivalent to $1 for each $1,000 of the same proportion of the sum of such surplus and reserves, which the reserve fund upon business transacted within the United States is of the total

reserve upon all business transacted, as of the close of the preceding accounting period used by such company for purposes of making its income tax return.

(*d*) Section 257 shall apply to all returns filed with the Commissioner for purposes of the tax imposed by this section."

The Issues.

The appellant contends that the term "fair average value of its capital stock for the preceding year" used in paragraph (1) subdivision (*a*) above, refers to the value of the shares of stock; that the average value of such shares for the year is the "business and financial reality" by which the tax is measured; that the fair average value of such shares of stock for the preceding year is to be determined here just as it would be for any other purpose, on the basis of all the available evidence; that while the Commissioner has wide discretion as to the evidence of value to be used in a particular case, sales of shares throughout the year in reasonable volume furnish the best evidence of the fair average value of the shares. Since the shares are property wholly different from the net assets of the corporation and having a different value, the assessment in this case, based solely upon corporate asset values, is incorrect. The fair average value of the shares for the critical year is here directly established by numerous sales

thereof, and appellant should therefore have judgment for the full amount sued for.

The Government's position, if the same here as in lower courts, is that the term "capital stock" must be given a broad, flexible meaning defined below as "the entire potentiality of the corporation to profit by the exercise of its corporate franchise", and that under this broad meaning the Commissioner is free to use asset values as the basis of the tax, ignoring share values altogether, as in the present case, or to use values based on earnings or on sales of shares, as in *Central Union Trust Co.* v. *Edwards,* 287 Fed. 324 (1923). The Court below, while adverting to this broad meaning with apparent approval, in fact held that the term "capital stock" meant net assets, and not the shares of stock or a value based on earnings.

The appellant denies that "capital stock" as here used means net assets; it denies that "capital stock" as used in the statute has any unusual meaning, or can in effect mean either shares or assets as the Commissioner may elect, or that the meaning of the term and the tests of value are so vague and flexible as to permit the Commissioner to make whatever assessment may seem most favorable to the Government. Appellant's position is supported by reference to the text of the statute, its legislative history, its general nature and purposes, and administrative and constitutional considerations.

Argument.

The question of statutory construction here raised is as to the meaning to be given to the words "fair average value of its capital stock for the preceding year" as used in Section 1000 of the Revenue Act of 1918 (*supra,* p. 9). The term "capital stock" has no fixed significance and must be construed in a particular statute by reference to the context, the nature and purpose of the statute, its history and other aids to construction. The term may, according to the context, refer either to capital paid in, to shares of stock, or to gross assets, or to net assets.

Cook on Corporations, Vol. I, Section 8, page 46, 8th Ed.

Corpus Juris, Vol. 9, page 1280.

Fletcher Cyc. Corporations, Vol. 5, page 5584.

Tennessee v. *Whitworth,* 117 U. S. 129 (1886).

Powers v. *Detroit & Grand Haven Rwy.,* 201 U. S. 543 (1906).

Hood Rubber Co. v. *Commonwealth,* 238 Mass. 369 (1921).

Central Union Trust Co. v. *Edwards,* 287 Fed. 324 (1923).

The shares of stock of a corporation and the capital or assets of a corporation are, of course, entirely different things, and the value of the shares of stock is different from and bears no fixed or necessary relation to the value of the corporate assets. For this reason the market value of the shares of the capital stock does not establish the value of the corporate assets or *vice versa.*

Van Allen v. *The Assessors,* 3 Wall. 573 (1865).

Des Moines Natl. Bank v. *Fairweather, et al.,* 263 U. S. 103 (1923).

Commonwealth v. *Hamilton Mfg. Co.,* 12 Allen 298 (1866).

Commonwealth v. *Cary Improvement Co.,* 98 Mass. 19 (1867).

National Bank of Commerce v. *New Bedford,* 155 Mass. 313 (1892).

National Bank of Commerce v. *New Bedford,* 175 Mass. 257 (1900).

People ex rel. Union Trust Co. v. *Coleman,* 126 N. Y. 433 (1891).

Schley v. *Montgomery County,* 106 Md. 407 (1907).

Pullman's Palace Car Co. v. *Central Transportation Co.,* 171 U. S. 138 (1898).

The distinction takes point, in the instant case, by comparison of the average value of the shares of stock as determined by the market sales ($34,803,608.99) with the fair value of the corporate assets as now found by the commissioner ($55,833,541.66) and as originally found by him ($103,910,409.07). It is therefore necessary to determine whether the statutory term "capital stock" is used in the sense of shares of stock or in some other sense.

I.

The statutory measure of the tax is the fair average value of the shares of capital stock, not the value of the corporate property.

A. The text of Section 1000 shows that the phrase "fair average value of its capital stock for the preceding year" is used in the sense of the value of shares of capital stock, not in the sense of the value of property and business.

(1) Share values can form the basis of an "average for the preceding year", as contemplated by the statute; assets or property values do not form a practicable basis for such an average.

The value to be ascertained is "the fair *average* value * * * *for the preceding year ending June 30.*" The statute clearly contemplates the use of a series of values during the specified year which can be mathematically averaged to obtain the mean. "Average" when used in connection with *"value"* for a *"year"* must refer to a mathematical average of values during the year.

> "As ordinarily employed the word (average) is not open to construction. It is the mean between two or more quantities or measures and is usually mathematically expressed by the quotient of the sum of the quantities, measures or numbers which are being compared, divided by the number of items used in the comparison."
>
> *Long* v. *Ottumwa Railway & Light Co.*, 162 Ia. 11, 28 (1913).

See also:

Swift & Co. v. *Board of Assessors,* 115 La. 321 (1905).

Hersh v. *The Northern Central Rwy. Co.,* 74 Pa. 181 (1873).

Central Granaries Co. v. *Lancaster County,* 77 Neb. 311, 326 (1906).

Jones v. *Marrs,* 263 S. W. 570 (Tex. 1924).

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The assets of a corporation, especially fixed assets such as plant or mineral reserves, are not ordinarily bought and sold, and are not appraised or valued in any way, except at rare intervals and at considerable expense. There could hardly be any fair *average* value for a particular year of the business and property of a corporation as an entirety because it would not be practicable to get a series of valuation figures to average. The Treasury recognizes this, and where it uses assets as the measure of the tax, it uses the most recent balance sheet of the taxpayer, as it did in this case, a proceeding which gives absolutely no significance to the word "average". The fair value of this company's assets on December 31, 1919, obviously is not a fair *average* value of anything.

The Treasury Regulations specifically provide:

> "Attempts to average the assets as a means of estimating the fair average value of the capital stock are not permitted."
>
> *Article 15, Regulations 64—1924 Ed.*

In substance the Treasury reads "average" out of the statute. What the Commissioner purported to determine in this case was "fair value" on a particular date and not "fair *average* value for the preceding year", as appears from the findings of fact. But this word "average" which the Treasury disregards is a most important key to the meaning of the statute here involved. The thing to be valued under the statute is something having different values at different times which can be ascertained and averaged, and that thing is "the capital stock divided into shares."

In contrast to the lack of frequent valuations of assets of domestic corporations, the shares of stock of the appellant and of a very large number of domestic corporations, including most of the largest, are freely bought and sold from day to day during the year in large volume, and such sales are recorded in a form convenient and readily accessible. It is practicable in this case and in a great many cases to get "the fair *average* value * * * for the *preceding year* ending June 30" of the shares of stock direct from actual

sales of such stock during such year. In some cases, it is true, there are no sales and there the fair average value of the shares would have to be obtained from secondary evidence as to the assets and earnings of the corporation and all other relevant circumstances.

The Court below did not attempt to show that the word "average" had been given any significance in making this assessment. It followed the Treasury Department in reading the word "average" out of the statute, and in construing the statute as if that word had not been used. Its only definite statement as to the meaning of "average" is that "average" indicates "apportionment", a statement which seems meaningless in view of the court's decision requiring a valuation of net assets on one date only. A valuation as of a single date certainly does not involve "apportionment". The court also seems to have thought that "average" might be interpreted as meaning the same as "fair". Such a construction ignores the mandate that the *"average"* be *"for the preceding year"* and deprives "average" of any independent significance. Both "fair" and "average" are given their ordinary meaning if "capital stock" means shares.

The tax imposed by Section 1000 on foreign corporations is measured by the *"average amount* of capital employed in the transaction of its busi-

ness in the United States". Here the Treasury does not disregard the word "average" but carefully provides how the averaging shall be done (*Art. 27, Regulations 64-1924 Ed.*). The tax on foreign corporations as administered involves no question of the valuation of assets but is based upon a proportionate part of the capital, surplus and undivided profits, a figure taken from the books (*Art. 24, Regulations 64-1924 Ed.*), or by the physical assets in the United States at book values, less a proportionate part of the liabilities. (*Form 708, 1925 Return*—Capital Stock Tax.)

(2) That "capital stock", as used in subdivision (1) of Section 1000 (a) is used in the sense of shares of stock, is established by the contrasting use of the word "capital" in subdivision (2).

A domestic corporation is taxed on the basis of "the fair average *value* of its *capital stock*" and a foreign corporation on the basis of "the average *amount* of *capital* employed * * * in the United States". To interpret "capital stock" as meaning corporate assets is to say that Congress used "capital stock" in subdivision (1) in the same sense as the very different phrase "capital employed" in subdivision (2).

In the case of *Hecht* v. *Malley*, 265 U. S. 144 (1924), this Court said that a construction of the capital stock tax on domestic corporations as a tax measured by assets draws this tax into har-

mony with the tax on foreign corporations measured by "capital" employed in the United States. But such harmony is only to be attained by holding that very different phrases used in closely associated clauses of the statute have the same meaning.

The statements of the Court in *Hecht* v. *Malley* as to the measure of the capital stock tax can not be deemed to decide the issue here raised for that issue was not involved and was not presented to the Court. The Court there held that three Massachusetts trusts were subject to the 1918 capital stock tax. Each of these trusts had transferable certificates similar to shares of capital stock. The tax assessed in each case had been based upon the value of the net assets of the trust. There was, however, no dispute as to the amount of the tax or the measure used; what each trust claimed was complete exemption.

The Crocker Association (one of the three trusts) based its claim for exemption on the ground that it had no "capital stock" because its certificates of beneficial interest had no stated or par value but were merely for 96,000ths of the beneficial interest in the organization, and because it had no separate account for "capital stock" or "capital" on its books. It claimed that there was no liability to the capital stock tax unless there was a designated share capital fixed in the articles or on the books. In rejecting this contention, this

Court adopted the argument made by the Government in its brief and said at p. 163:

> "We think that in the Act of 1918, in which the tax upon an association is based upon the average value of its 'capital stock,' including surplus and undivided profits, these words are not to be given a technical meaning, but should be interpreted, in their entirety, and, *in the absence of a fixed share capital,* as equivalent to the capital invested in the business, that is, the net value of the property owned by the association and used in its business. As was said by the Circuit Court of Appeals, the phrase in the statute as to " 'including surplus and undivided profits' puts beyond doubt the question of the congressional intent to measure this tax by business and financial realties, not by bookkeeping forms or mere names." And this construction is in harmony with the provision as to the excise tax on a foreign association, which is fixed upon the value 'of the capital actually invested in the transaction of its business in the United States.'
>
> We therefore conclude that the Crocker Association was also subject to the tax, and that this was properly measured by the Collector by the net value of its property—no question being made as to the correctness of his valuation." (Italics ours.)

These statements in terms apply only *"in the absence of a fixed share capital"* and hence are

not directly controlling here. The Court held that nothing turns on the purely formal distinction between no par stock and par value stock. The association admitted that if its articles stated a definite capital, and its books showed a capital account and a separate undivided profits and surplus account it would have a "capital stock" and be taxable on its capital, surplus and undivided profits. The Court refused to exempt the association because of the way in which its accounts were kept and the absence of a stated capital in the trust agreement or elsewhere. The Court naturally adverted to the use of assets values as the measure of the tax because that was the measure used in the case with the concurrence of both parties, and the contention now made that "capital stock" means shares was not urged or considered. The Court's decision would have been precisely the same if share values had been used as the measure, because the Crocker Association had shares as well as assets.

The contrast in the statute here under consideration between "fair average value of its capital stock" for domestic corporations and "average amount of capital employed" for foreign corporations is striking and an important indication of the Congressional intent. This contrast is emphasized by the statuatory requirement as to "capital stock", that there be a determination of its "fair average *value*"; but as to "capital", the

statute requires a determination of its "average *amount*".

This method of construing the term "capital stock" on the basis of its use in contrast to a term referring to property was employed by this Court in *Tennessee* v. *Whitworth*, 117 U. S. 129 (1886). In that case the State of Tennessee petitioned for a writ of mandamus to compel the defendant Whitworth, a tax collector, to assess for taxation certain shares of stock in a Railway Company. The defendant alleged that the shares of stock of the Railway Company were exempt from taxation under a charter from the State which provided that:

> *"The capital stock of said company shall be forever exempt from taxation,* and the road with all its fixtures and appurtenances, including workshops, warehouses, and vehicles of transportation, shall be exempt from taxation for the period of twenty years from the completion of the road, and no longer." (Italics ours.)

The Court held that under this charter provision the phrase "capital stock" referred to the shares of stock. The "capital stock" was exempt from taxation forever, but the property or capital of the Railroad Company was exempt for but twenty years. This contrast made it clear that the perpetual exemption of "capital stock" applied not to the property but to the shares of stock. Mr.

Chief Justice Waite for the Court said, at page 138:

> "As was shown in *Railroad Companies* v. *Gaines,* above cited, the words 'capital stock of said company', and the words 'the road with all its fixtures and appurtenances', were used in the charter to describe different things. The 'capital', which upon the payment by the subscribers belonged to the corporation, has been converted into the railroad and its appurtenances, and it had no separate existence as a taxable thing after the road was built and equipped. But the 'capital stock' divided into shares, subscribed and paid for by the persons to whom the shares were originally issued, still has, and was by the charter intended to have, an existence separate and distinct from the property into which the money paid for it has been converted, * * * The charter exempted the stock from taxation clearly because the property which represented the stock had been put in its place as a taxable thing. The exemption is of the thing called the 'capital stock' divided into shares."

In *Railroad Companies* v. *Gaines,* 97 U. S. 697 (1878), the Court had held that the property of the Railroad Companies was not exempt from taxation forever under a charter provision reading exactly the same as the one quoted above. The Court said that it was clear that the property was to be taxable at the end of twenty years, so that whatever was perpetually exempt as "capital

stock" it was not the property of the corporation which was so exempt.

Since only values attributable to the United States were to be taxed in the case of foreign corporations, it was natural that Congress should adopt for them a measure based upon assets in the United States, rather than the measure of share values adopted for domestic corporations. The Treasury itself recognizes that the measure of the tax for domestic corporations is different from that for foreign corporations, that "average amount of capital employed" does not mean the same as "fair average value of capital stock" (*Art. 26, Regulations 64—1924 Ed.*).

The only construction which will give an effect to the contrast between the phrases used in Section 1000, read together as they must be, is that contended for by the appellant. The distinction must be that between corporate shares and corporate assets.

(3) The special statutory provisions as to mutual insurance companies support appellant's position.

The provisions of Section 1000 of the 1918 Act as to mutual insurance companies, which, of course, have no shares of stock, strongly support appellant's construction of the Statute. Section 1000 provides in part as follows:

> "The taxes imposed by this section shall apply to mutual insurance companies, and in the case of every such domestic company the

tax shall be equivalent to $1 for each $1,000 of the excess over $5,000 of the sum of its surplus or contingent reserves maintained for the general use of the business and any reserves the net additions to which are included in net income under the provisions of Title II, as of the close of the preceding accounting period used by such company for purposes of making its income tax return; *Provided, That* in the case of a foreign mutual insurance company the tax shall be equivalent to $1 for each $1,000 of the same proportion of the sum of such surplus and reserves, which the reserve fund upon business transacted within the United States is of the total reserve upon all business transacted, as of the close of the preceding accounting period used by such company for purposes of making its income tax return."

The tax of domestic mutual insurance companies is not based on "capital stock" at all or on any average value over a period but by virtue of this special provision is based on reserves measuring the excess of assets over certain liabilities on a specified date. This special provision was inserted to take care of a special class of cases where the ordinary measure of the tax, the value of the shares of stock, obviously could not be used because the company had no shares of stock. If Congress intended that the tax on domestic corporations should be based upon a valuation of assets, this special provision as to domestic mutual insurance companies was wholly unnecessary and surplusage.

(4) The statutory reference to "surplus and undivided profits" is consistent with appellant's view.

The last sentence of subdivision (1) of paragraph (*a*) of Section 1000 reads:

> "In estimating the value of capital stock the surplus and undivided profits shall be included."

This sentence is referred to in *Hecht* v. *Malley*, (*supra*) and is strongly relied upon by the Court below. The significance given to this sentence seems to leave out of account its relation to the rest of the statute, the subject matter of the statute and the origin of the quoted sentence.

The sentence is a survival from the Bankers Tax Law of October 22, 1914 (38 Stats. 750), a statute imposing a tax on bankers, and differing fundamentally from the Capital Stock Tax. The Bankers Tax was on "capital employed in banking", and in order to show clearly that accumulated earnings as well as capital originally paid in were to be taken into account, a phrase was incorporated in the statute reading:

> "and in estimating capital surplus and undivided profits shall be included."

This law was expressly stated to be a tax based on capital, surplus and undivided profits, that is, on assets. In drafting the 1916 Revenue Bill, it was first proposed to continue this tax on capital

employed in banking. In lieu of this, however, a tax was imposed on all corporations instead of merely on bankers, and the measure of the tax was changed from "capital employed in banking" to "fair average value of its capital stock". This change in language unmistakably showed that the new tax was on something other than assets, a fact which the Treasury charged with the administration of both laws recognized in the first capital stock tax regulations. (*Art. 6, Reg. 38*). The substantial change in language is of controlling importance; the mere continuation of the reference to surplus and undivided profits is of little significance. The 1918 Revenue Act here under consideration merely followed the language of the 1916 Act.

The court below, in its opinion, wholly disregarded the contrast between "capital stock" and "capital employed"—a major difference between the Bankers Tax and the Capital Stock Tax—read the word "average" out of the statute, and gave controlling significance to the incidental continuation of the reference to surplus and undivided profits.

The situation in the present case is entirely different from that in *Home Savings Bank* v. *Des Moines,* 205 U. S. 503 (1907) cited below. There the tax was clearly a state *property* tax on the corporation, the statute specifically called for a statement of assets and liabilities and provided that "the

property of such corporation shall not be otherwise assessed". There a statutory reference to capital, surplus and undivided profits assisted the Court in determining that the tax nominally on shares of stock was in fact on the corporation's property. But here the tax is not a property tax and could not be imposed as such without apportionment, but is an excise tax which might properly be measured by the value of the shares. The *Home Savings Bank* case is, in fact, but one of a large number of cases dealing with *direct property* taxes imposed by the states on corporations. The Courts have often held that the nature of the tax as a property tax showed that the term "capital stock" as used in such statutes meant the corporate assets.

Pacific Hotel Co. v. *Lieb,* 83 Illinois, 602 (1876);
Henderson Bridge Co. v. *Commonwealth,* 99 Kentucky 623 (1895);
People v. *Coleman,* 126 N. Y. 433 (1891).

But such decisions are not in point where, as in this case, the tax is an *excise* tax and not a direct property tax, and where the tax is imposed by Congress which has no power to levy an unapportioned direct tax. (*See Infra p. 55.*)

The Government's contention that the tax is measured by the net value of the enterprise is not

supported by this statutory reference to surplus and undivided profits. "Surplus and undivided profits" ordinarily mean figures taken from the accounts of the corporation and appearing on its books. "Surplus and undivided profits" are ordinarily accumulated earnings and income as determined by a closing of the books of account at the close of a fiscal period.

Douglas v. *Edwards,* 298 Fed. 229, 241, (1924).

They do not ordinarily include unrealized appreciation, appraised value of assets, developed good will, going value, and other possible elements of value not entered on the books, which the Government is attempting to include in the measure of the tax. "Surplus and undivided profits" do not include such unrealized appreciation as cannot be earned until future years and which is no part of the profits until realized in the future and which therefore cannot be any part of the surplus and undivided profits "for the preceding year".

Sexton v. *C. L. Percival Co.,* 177 N. W. 83, 86 (Ia. 1920).

T. P. Cochrane v. *Interstate Packing Co.,* 139 Minn. 452 (1918).

Even where appreciation has been taken up on the corporation's books and the surplus correspondingly increased, accountants require it to be

specially designated as a "surplus arising from a revaluation". The Courts generally refuse to recognize such unrealized appreciation as "surplus and undivided profits" available for dividends.

Kingston v. *Home Life Insurance Co. of America,* 101 Atl. 898 (Del. 1917).
Southern California Home Builders v. *Young,* 188 Pac 586 (Cal. App. 1920).

Of course, unrealized appreciation even though entered on the books, is not income and hence not a part of "undivided profits".

Baldwin Locomotive Works v. *McCoach,* 221 Fed. 59 (1915).

In holding that the term "paid in or earned surplus" excluded unrealized appreciation this Court said:

> "The principal line of demarcation—that based on actual costs, excluding estimated appreciation—finds reasonable support upon grounds of both theory and practice, in addition to the important consideration of convenience in administration, already adverted to. There is a logical incongruity in entering upon the books of a corporation as the capital value of property acquired for permanent employment in its business and still retained for that purpose, a sum corresponding not to its cost but to what probably might be realized by sale in the market. It is not merely

> that the market value has not been realized or tested by sale made, but that sale cannot be made without abandoning the very purpose for which the property is held, involving a withdrawal from business so far as that particular property is concerned."
>
> *La Belle Iron Works* v. *United States*, 256 U. S. 377, 393 (1921).

The reference to surplus and undivided profits is given ample scope and significance under appellant's construction of the statute. When the fair average value of the shares of stock is determined from sales, the corporate surplus and undivided profits are fully taken into account and are included in the estimated value, for the market value of the shares reflects and includes all the elements of value in the shares as appraised by the public. This is the view taken by the Commissioner of Internal Revenue who asserts the right to measure the Capital Stock Tax by share values, if that yields a higher tax than the basis of net assets. The present regulations (Regulations 64—1924 Ed.) provide as follows:

> "Article 16. *Surplus and undivided profits.* —The surplus and undivided profits of a corporation must be included in estimating the fair average value of its capital stock. If the fair average value be determined from the book value, the surplus and undivided profits are included in the assets; if from

> sales, they are necessarily a factor in determining the market price; and, if from net income, they are reflected to a greater or less extent in the earnings."

The Commissioner thus finds no difficulty in harmonizing the reference to surplus and undivided profits with the use of share values as a measure of the tax. The surplus and undivided profits are, of course, factors in determining the market price of the shares when that is below asset values, as well as when that is more than asset values.

In cases where there are no sales of shares, surplus and undivided profits are, of course, factors to be taken into account in estimating the fair average value of the shares. The phrase also serves the purpose of helping to show that it is not the par value of the shares, but their actual value, whether more or less than par, that is to be used. The construction of the statute advanced by appellant thus gives to this sentence a reasonable consideration and significance and gives to it the amount of weight to which it is entitled in view of its origin.

This construction of the statute, it will be noted, was the construction adopted by the Treasury contemporaneously with the passage of the first capital stock tax law in the Regulations drafted and approved by the officials who were then administering the Bankers Tax imposed by the law of 1914 from which the reference to surplus and undivided profits was taken. Article 6

of Regulations No. 38 (1916) provided in part as follows:

> " 'Cases in which fair average value of stock shall be estimated.
>
> '(*c*) Case III.—*If Case I and Case II can not be applied, viz.,* the stock is not listed on any exchange, and no actual sales have been made during the preceding fiscal year, or if the price at which sales have been made is not known to the officer making the return the fair average value of the capital stock shall be estimated, and the surplus and undivided profits for the preceding fiscal year will be taken into consideration as required by the statute, as well as the nature of the business, its earning capacity and average dividends paid, or profits earned during the preceding five years.' "

The above Regulation was in force until August 1918 and the payments of capital stock taxes made in January and July 1917 were computed on this basis.

The special provision of subdivision (*b*) of Section 1000 that in the case of insurance companies such deposits and reserve funds as they are required by law or contract to maintain or hold for the policyholders shall not be included, is a provision complementary to the general reference to surplus and undivided profits, and merely recognizes that such deposits and reserve funds should in fairness be treated as liabilities and not as a part of the surplus.

(5) The statutory use of the word "estimating" does not indicate that what is to be estimated is the value of the assets rather than the value of the shares.

The court below relied somewhat upon the use of the word "estimating" in the statute, and apparently thought that this excluded reference to the market value of the shares since "no difficulties present themselves in ascertaining the real, mathematical, average, market value of the same". But "estimating" as here used means no more than "determining" or "valuing".

The word "estimating" was first used in this connection in the Bankers' Tax Law (Act of October 22, 1914, 38 Stats. 750), and is a part of the sentence carried over bodily from that statute. The Bankers' Tax Law was readily and simply applied to capital, surplus and undivided profits, figures taken from the books, although that statute provided that "in estimating capital surplus and undivided profits shall be included". The presence of the word "estimating" was never thought to require the adoption of some difficult and uncertain measure of taxation involving valuations and not susceptible of a check.

The logical conclusion of the argument of the Court below seems to be that where the measure of the tax is to be estimated, any test easily applied and leading to a definite and certain result must be excluded from consideration because it involves no difficulties or uncertainties. In con-

struing this tax statute, however, this Court undoubtedly will adopt a construction which will so far as possible make the amount of the tax readily and definitely ascertainable by both the taxpayer and the Government.

With respect to this statute, no matter how simple the test may be, there will be ample room for the exercise of judgment. In measuring the tax by the value of the shares of stock, the Commissioner will find it easy to estimate the fair average value in some cases where there have been many sales and will find it more difficult to estimate such value in other cases where there have been no sales or few sales, but in every case the fair average value of the shares of capital stock will be *estimated* on the basis of all the available data. This is exactly what was contemplated by Congress. The Chairman of the Committee in charge of the 1916 Revenue Bill (Mr. Kitchin) said as to the measure of the capital stock tax, "When it (capital stock) has a market value, it would be the market value; but some stocks have no market value, and they would have to ascertain what the fair actual value is." (*See extensive quotation, infra p. 42.*)

The case of *Powers* v. *Detroit & Grand Haven Railway Company,* 201 U. S. 543 (1906), cited below, involved a charter provision imposing an annual tax on "the capital stock of said Company paid in", and the Court held that this clearly referred to the property which the corporation had received and presumably held. In

stating that the word "estimated", as there used, involved valuation rather than mathematical apportionment, the Court is apparently contrasting a valuation of assets with the par value of the shares of stock. There is nothing in the language used to indicate that the Court meant that a valuation of shares was any less an estimate than a valuation of assets.

B. The legislative history of this statute and of statutes in pari materia preceding it shows that Congress intended that the measure of the tax on domestic corporations should be the fair average value of the shares of stock, and not the value of corporate assets.

Resort to legislative history is fully warranted in cases such as this, where the meaning of the statute is not entirely clear from its words.

Church of the Holy Trinity v. *United States,* 143 U. S. 457 (1892);
United States v. *St. Paul M. & M. Ry. Co.,* 247 U. S. 310 (1918).

(1) Tax on capital of Bankers—1914.

The first general capital stock tax law was preceded by the Act of October 22, 1914 (38 Stats. 750), which in Section 3 provided for a tax on bankers as follows:

"Bankers shall pay $1 for each $1,000 of *capital used or employed,* and in *estimating* capital *surplus and undivided profits* shall be

included. The amount of such annual tax shall in all cases be computed on the basis of the capital, surplus, and undivided profits for the preceding fiscal year." (Italics ours.)

A bankers' tax in similar language had been imposed by the Act of June 13, 1898 (30 Stats. 448). It was settled that the statutory measure of these taxes was the capital, surplus and undivided profits, *i. e.*, the net assets, employed in banking.

> *Leather Manufacturers' National Bank* v. *Treat*, 128 Fed. 262 (1904); Certiorari denied, 198 U. S. 584 (1905).

Apparently no questions as to valuation of assets arose in administering these statutes.

(2) First General Capital Stock Tax—1916.

The bankers' tax remained in force until January 1, 1917. Its place was taken by a capital stock tax imposed upon all corporations by Section 407 of the Revenue Act of 1916 (39 Stats. 789), the first general federal capital stock tax law. This tax was measured by—

> "the fair value of its *capital stock* and in estimating the value of capital stock the surplus and undivided profits shall be included: * * * The amount of such annual tax shall in all cases be computed on the basis of the *fair average value* of the *capital stock for the preceding year*"; (Italics ours.)

The bankers tax was measured by "capital used or employed" and had been held to be a tax measured by the amount of the property employed in banking. The new tax which was adopted in the Revenue Act of 1916 applied to all corporations, and in the case of domestic corporations was based on the "fair average value" of the "capital stock" rather than on "capital used or employed". In the case of foreign corporations it was based on the "capital actually invested in the transaction of its business in the United States" instead of on "capital used or employed".

In changing the tax from one on banks to one on all corporations, it is clear that Congress found it advisable to change the measure of the tax. The assets of banks consisted largely of cash, loans and securities. Banks kept accurate books according to established and uniform methods under strict State or Federal supervision. Hence they were readily taxed on capital, surplus and undivided profits employed in banking, figures taken from the books and involving no questions of valuation. There was no such uniformity in the character of the assets or the methods of bookkeeping of corporations generally. Congress recognized that all corporations could not be taxed with uniformity on the basis of amount of capital, which had been used in taxing banks, and adopted as the measure for the new and more comprehensive tax on all domestic corporations

the "fair average value" of the "capital stock". This change in the language describing the measure of the tax on domestic corporations clearly shows an intent to change from the earlier basis, property to the basis, shares of stock.

If Congress desired to include property, whether or not used or employed, that would have been done by dropping the words "used or employed" and retaining the word "capital". If Congress desired to include assets such as developed good will or unrealized appreciation in addition to the assets ordinarily included under the phrase "capital, surplus and undivided profits", it would have made this important change clear by using some phrase such as "the fair market value of the net assets". The change from "capital" to "capital stock" was not made to change the kind of *property* which was to be included in the measure of the tax but was made for the purpose of showing that *share value*, rather than any valuation of assets, was to be the measure of the new tax on domestic corporations.

Congress so understood the matter. In the debate on the floor of the House of Representatives just prior to the passage of this Act a discussion took place with reference to the capital stock tax between Mr. Kitchin, who was Chairman of the Ways and Means Committee and in charge of the Bill, and other members which is very help-

ful in the construction of the statute. The discussion was as follows:

> Mr. Denison: The Senate amendment taxes the capital stock and undivided profits.
>
> Mr. Kitchin: We fixed it at the fair value of the capital stock.
>
> Mr. Denison: The effect of the amendment as insisted upon by the House managers will be to increase the tax, generally speaking?
>
> Mr. Kitchin: No; to decrease the tax. The Senate amendment had the tax on the capital stock, surplus, and undivided profits —that is, the par value of the capital stock. We have put a tax of 50 cents a thousand upon the fair average value of the capital stock.
>
> Mr. Denison: *That means the market value?*
>
> Mr. Kitchin: *When it has a market value, it would be the market value; but some stocks have no market value, and they would have to ascertain what the fair actual value is.*
>
> Mr. Denison: Does not the gentleman think that ordinarily the market value of bank stock is far greater than the par value of the capital stock with the surplus added?
>
> Mr. Kitchin: Yes; and they would take that into consideration. They would get the actual value, and the provision declares they can consider the surplus and undivided profit in ascertaining that value. The earnings would also be considered.

Mr. Denison: The result will be that all banks will pay their regular income tax and then this surtax of 50 cents per thousand on the actual value of the capital stock?

Mr. Kitchin: Yes; and all other corporations. The bill as reported to the House had it $1 on the capital stock and surplus and undivided profits, and confined it to banks. This is 50 cents per thousand on the fair value only of the capital stock and applies to all corporations.

* * * * *

Mr. Mann: Mr. Speaker, in reference to that tax of 50 cents a thousand on the capital stock, I understood the gentleman to say that it would be 50 cents a thousand upon the fair market value?

Mr. Kitchin: It reads, "The amount of such annual tax shall in all cases be computed on the basis of the fair average value of the capital stock for the preceding year."

Mr. Mann: Who determines that?

Mr. Kitchin: The Treasury Department determines that, just as it would if we had put it the actual value. It would have to make investigation and determine the value.

Mr. Mann: Of course, it is a very simple matter to determine what the capital stock and surplus, and so forth, is, and *it may be a simple matter to determine what the fair average value is, which, I take it, is the fair market value, where there is a market.*

Mr. Kitchin: *Yes.*

Mr. Mann: *Is that to be determined as of*

a particular date, or the fair value for the year?

Mr. Kitchin: *It is a fair average value for the preceding year.*

Mr. Mann: *I would think it would take considerable figuring to find out the market value of some of the stock.*

Mr. Kitchin: *I imagine they would take a day or two in each month of the year—say the first day in the month and the last—and average it in that way; or, as the gentleman from Pennsylvania* (Mr. Kreider) *suggests, as is done by many corporations, the highest and lowest value during the year would be taken and divide it by two to get the average or the highest and lowest in each month, and from this get the average.* It would be more difficult than if we had said the par value, but that would not be just, for some stocks of par value of 100 are not worth 20.

Mr. Mann: These people must make a return in the first instance?

Mr. Kitchin: Yes.

Mr. Mann: I take it that the Treasury Department would not fix the value of the stock before the return is made?

Mr. Kitchin: They make a return first, and they swear what the fair average value of the stock was for the preceding year. Of course, if the Department has any reason to suspect them, it would make them give it more particularly and in detail.

Mr. Mann: This of course will not tax the indebtedness?

Mr. Kitchin: Oh, no, this will not. The Finance Committee of the Senate had it on the capital. Then they had it on the capital stock, surplus and undivided profits, and we now have it on the fair average value of the capital stock.

(Congressional Record—House, Sept. 7, 1916, 64th Congress, 1st Session, Vol. 53, Part 13, page 14118.) (Italics ours).

Every word of this debate indicates that the shares were to be valued at their market value or actual value. Any idea that the tax was to be based upon capital was explicitly denied. This discussion cannot be dismissed as an exposition of opinion as to a detail of administration for it clearly shows that reference to the market value of the shares was thought to be the primary method of valuing the capital stock.

The court below seemed to think that because the 1914 Bankers Tax was measured by assets, the 1916 Capital Stock Tax which supplemented it must also be on assets. But the substantial differences in language, resulting from differences in the scope of the two statutes, make any such reasoning inadmissible. The logical presumption is that in changing the language Congress intended to change the measure.

A comparison of the language of Section 407

of the Revenue Act of 1916 with that of Section 1000 of the Revenue Act of 1918 here involved, will show that the two statutes levy the capital stock tax on exactly the same basis. The legislative history of Section 407 thus helps to show the meaning of Section 1000 of the Revenue Act of 1918.

(c) Capital Stock Tax—1918.

The capital stock tax adopted in the Revenue Act of 1916 was replaced as of July 1, 1918, by Section 1000 of the Revenue Act of 1918 adopted February 24, 1919, the statute here under discussion. Section 1000 of the Revenue Act of 1918 reads in part as follows:

> "Sec. 1000. (*a*)
>
> "(1) Every domestic corporation shall pay annually a special excise tax with respect to carrying on or doing business, equivalent to $1 for each $1,000 of so much of the *fair average value of its capital stock* for the preceding year ending June 30 as is in excess of $5,000. In estimating the value of capital stock the surplus and undivided profits shall be included;" (Italics ours.)

This language appeared in the 1918 Revenue Bill as passed by the House. The Senate amended this section of the House Bill so that Paragraph (1) read as follows:

> "Every domestic corporation shall pay annually a special excise tax with respect to

carrying on or doing business, equivalent to $1 for each $1,000 of the excess over $5,000 of the *amount of its net assets* shown by its books as of the close of the preceding annual period used by the corporation for purposes of making its income tax return; but if the corporation made no such return then of the excess over $5,000 of the amount of its net assets shown by its books as of the 30th day of June preceding." (Italics ours.)

(H. R. 12863, 65th Congress, 3d Session Committee Print—As Agreed to in Conference, Sec. 1000.)

The Conference Committee restored the language used in the House Bill explaining the change as follows:

"The House Bill imposed upon a domestic corporation an annual excise tax equivalent to $1 for each $1,000 of so much of the *fair average value of its capital stock* for the preceding year as is in excess of $5,000. It also provided that in estimating the value of the capital stock the surplus and undivided profits should be included. This is the basis of the tax under the present law, with the rate increased 100 per cent. *The Senate amendment changes the basis of the tax from the fair average value of the capital stock to the amount of the net assets shown on the books as of the close of the preceding income tax year; and the Senate recedes.*" (Italics ours.)

(House Report No. 1037, 65th Congress, 3d Session, p. 84.)

Congress thus deliberately rejected as the measure of this tax the net assets as shown by the books and continued as the measure of the tax the fair average value of the capital stock of the corporation. If Congress had intended merely to reject "net assets shown by its books" for "actual value of net assets" it would have retained the words "net assets" and have modified the basis of valuation. By striking out the words "net assets" and inserting the words "fair average value of its capital stock", Congress plainly intended to adopt some other measure for this tax than that of "net assets" valued in any manner. The Court will note that the assessment of the Commissioner sought to be sustained in this case is upon the "net asset" basis, clearly rejected by Congress in adopting the report of the Conference Committee. As shown by the tabulation in Finding 16, the Commissioner determined the "Fair value of capital stock" by taking "Total liabilities" from "Total value of assets".

Action taken by the 65th Congress in fixing the basis for invested capital in this same statute, the Revenue Act of 1918 clearly rebuts any inference that it intended to adopt as a basis of this tax any valuation of corporate assets. The War Excess Profits Tax was by far the most important tax imposed by the Revenue Act of 1918, and absorbed 30%, 65% or even 80% of the net income of corporations in excess of certain credits (Sec.

301). Invested capital was a highly important factor in determining the amount of these credits (Sec. 311-312) and in determining at what rate the income should be taxed (Sec. 301). The 65th Congress was strongly urged to adopt a valuation of assets as the basis for invested capital so that all corporations would be placed upon an equal basis regardless of the time their assets were acquired. Congress refused to do so because of the insurmountable difficulty of making and checking such a valuation. The Senate Finance Committee in reporting the Revenue Bill of 1918 to the Senate said:

> "Speaking generally, assets are valued, for the purpose of determining invested capital, at the price paid in acquiring them without recognition of subsequent appreciation. Weighty arguments have been presented in favor of abandoning this rule and valuing property acquired before March 1, 1913, as of that date. But the Committee believes that such a method would be impracticable; that it would impose upon the Treasury Department the impossible task of valuing nearly all of the durable property of the country as of a date nearly six years in the past."
>
> (Senate Report No. 617, 65th Congress, 3d Session, p. 11.)

When the Revenue Act of 1918 was adopted, Congress was fully aware of the tremendous ad-

ministrative difficulties which had arisen in connection with federal taxes. It was seeking to relieve, not to increase the administrative burden. No one at that time suggested that the relatively unimportant capital stock tax involved an annual estimation of the corporate net worth of every domestic corporation including good will, unrealized appreciation, going value, or other "potentialities". No such idea is suggested by the Statute. The legislative history conclusively shows that no such meaning should be inferred.

C. The statute should not be construed in such a way as to impose upon taxpayers and the Government the burden of frequent revaluations of all corporate property and business in the United States, including the value of intangible assets.

The Court below refused to take difficulties of administration into account as an aid in construing the statute. In construing the 1917 Excess Profits Tax Act (*LaBelle Iron Works* v. *U. S., supra*), as in other instances, this Court relied upon administrative considerations in resolving the meaning of statuatory language.

Adoption of a valuation of the corporate property and business as an entirety as the basis of the capital stock tax would make necessary the determination at least once in each year of the fair value of all the corporate assets in the United

States, including unrealized appreciation, good will, going value and other intangible assets exceedingly difficult to value and in many cases not appearing on the books. To determine the "fair *average* value" of these assets "for the preceding year", as commanded by the statute would require a series of such valuations during the year. Appraisals would have to be made by taxpayers and checked by the Treasury annually or at shorter intervals of all factories, all real estate, all timber reserves and mineral deposits, all railroads and public utilities, and all equipment owned by domestic corporations. The more elusive and fluctuating intangible values would have to be appraised.

The fact that for another purpose many mining companies have had a determination of the value of their mining properties as of March 1, 1913, would not justify the general use of these valuations for later years. *The depletion values as of March 1, 1913, established by the Income Tax Unit, are not satisfactory evidence of asset values in 1919 and later years because conditions may change radically.* Yet the Treasury customarily uses the valuations as of March 1, 1913, less an allowance for depletion sustained, as the value of the mining property in later years (*Instructions, Form 707*—1925, Return). The general use by the Treasury of such valuations, though necessarily inaccurate as applied to

periods from six to ten years later than the valuation date emphasizes the impossibility of making an annual revaluation of assets.

The Senate Finance Committee well said that valuations of all corporate property could not be made (*supra,* p. 49). The Interstate Commerce Commission, over a long period and with a large staff of engineers and at great expense to the Government and to the railroads, has found it most difficult to make a single valuation of the railroads of the country for rate purposes (*Delaware & Hudson R. R. Co.* v. *I. C. C.,* pending, U. S. Sup. Ct.). Valuation annually, or at shorter intervals, of all corporate assets, including railroad assets, would be very much more difficult. All the familiar but difficult problems of public utility valuation would be present, for public utility corporations are subject to the tax. The Treasury has had great difficulty in fixing mineral, oil, gas and timber values as of March 1, 1913, for determining depletion deductions for income tax purposes. The Tax Simplification Board states, "In view of the time that has been consumed in the valuation of the railroads, and in further view of the much greater difficulty encountered in valuation of natural resources, it is apparent that in the time at its command the Bureau of Internal Revenue can not do better than make a very rough approximation of the value of natural resources." (See 1st Report Tax Simpli-

fication Board, Appendix, p. 90.) Yet the Court is asked to hold that this tremendous annual valuation burden was imposed by Congress on the Treasury and the corporations of the country to determine a relatively minor tax.

In holding that Congress adopted cost rather than later values of corporate assets as the measure of invested capital for the purposes of the excess profits tax, this Court supported its construction of the statute by the following reference to the practical difficulty of making valuations:

> "It is clear enough that Congress adopted the basis of 'invested capital' measured according to actual contributions made for stock or shares and actual accessions in the way of surplus, valuing them according to actual and *bona fide* transactions and by valuations obtaining at the time of acquisition, not only in order to confine the capital, the income from which was to be in part exempted from the burden of this special tax, to something approximately representative of the risks accepted by the investors in embarking their means in the enterprise, *but also in order to adopt tests that would enable returns to be more easily checked by examination of records, and make them less liable to inflation than if a more liberal meaning of 'capital and surplus' had been adopted; thus avoiding the necessity of employing a special corps of valuation experts to grapple*

with the many difficult problems that would have ensued had general market values been adopted as the criteria." (Italics ours.)

La Belle Iron Works v. *U. S.*, 256 U. S. 377, 389 (1921).

Adoption of the share basis, prescribed by the statute, in contrast makes it comparatively easy in the case of most important corporations to determine the amount of their capital stock tax. The stock of corporations is sold with much more frequency than the assets. The stock of a great many corporations is regularly dealt in from day to day on organized exchanges or markets, and the market price is permanently recorded in available form. The capital stock tax of the corporations representing a very large proportion of the corporate wealth of this country can, therefore, be determined on the basis of actual sales of the shares of stock. The value of the stock of close corporations can be determined in the light of ascertained values of comparable active stocks. Many such stocks are valued from time to time by Federal or State authorities for inheritance tax or other purposes. Shares certainly are more often sold or appraised and are far more easily valued in all cases, than assets. Adoption of the share basis will keep the law administrable and make possible its uniform application to all taxpayers.

The apparent willingness of the Treasury to use the impossible test of valuing assets and its

final action in this specific case in stating an asset value for December 31, 1919, does not make that course any more defensible or practicable. Nor does it render any more defensible an interpretation of the law which would impose this stupendous and contentious task. These administrative considerations help to show the probable intent of Congress. They support and fortify appellant's position.

D. The fact that this statute is a federal excise tax on corporations does not indicate that the measure of the tax is the value of the corporate net assets or that a broad, flexible and indefinite measure must be adopted. The use of the fair average value of the shares as the measure of the tax is consonant with the general purpose and nature of the statute.

The capital stock tax is a special excise tax with respect to carrying on or doing business imposed on corporations. The nature and characteristics of such a tax are fully discussed by this Court in *Flint* v. *Stone Tracy Co.*, 220 U. S. 107 (1911). That decision emphasized the broad power of Congress to adopt any measure which it chose for such a tax and sustained a corporation excise tax measured by net income. That Congress has the power to measure the capital stock tax by the fair average value of the shares of capital stock cannot be doubted.

Hamilton Co. v. *Massachusetts*, 6 Wall. 632 (1867).

The Delaware Railroad Tax, 18 Wall. 206 (1873).

The Court below seemed to think that because this is an excise tax on corporations on the privilege of doing business as such, it must be measured by the value of the privilege

> "ascertainable from the net value of its holdings, its possessions, the things tangible and intangible which concentrated into a single unit are fundamentally its capital stock, from which earnings and dividends are expected to flow"

and that since this is a tax upon the corporation, it must be measured by its resources and not by property emanating from the corporation but belonging to the individual stockholders, *i. e.,* the shares of stock.

It is by no means true, however, that the tax on a privilege must be measured by the value of the privilege. Such a tax may be measured by any relevant standard selected by Congress. In fact, such taxes have not usually been measured by the value of the privilege.

United States v. *Singer,* 15 Wall. 111 (1872), Capacity and production.

Patton v. *Brady,* 184 U. S. 608 (1902), Pounds tobacco manufactured.

Cornell v. *Coyne,* 192 U. S. 418 (1904), Production filled cheese.

McCray v. *United States,* 195 U. S. 27 (1904), Production colored oleomargarine.

Spreckels Sugar Refining Co. v. *McClain*, 192 U. S. 397 (1904), Gross receipts.

Flint v. *Stone Tracy Co.*, 220 U. S. 107 (1911), Net income from all sources.

Furthermore, the idea that the value of the privilege of doing business as a corporation is the net value of the corporate resources is clearly wrong. The property and business may be just as valuable if used or carried on as a partnership, trust or individual. The loss of the corporate charter would not destroy the value of the property. The value of the privilege of doing business as a corporation is by no means the net value of the corporate assets and business.

The reasoning of the Court below based on the nature of the tax wholly disregards the marked difference between a tax on corporate *property* and an *excise* tax. A state corporation tax on property, even though stated to be a tax on "capital stock", is necessarily a tax measured by the value of the property of the corporate taxpayer. In such cases the courts hold that the nature of the tax shows that the term "capital stock" means the property of the corporation, although recognizing that this gives to that term a non-technical and unusual meaning.

I Cook on Corporations, 8th Ed., p. 47, and cases cited note 2.

People, ex rel. Union Trust Co. v. *Coleman*, 126 N. Y. 433 (1891).

The New York Court of Appeals recently characterized "capital stock" so interpreted as "an unfortunate expression interpreted to mean property rather than shares of capital stock".

People v. *Cantor*, 236 N. Y. 417, 424 (1923).

An excise tax on corporations, however, may as readily be measured by the value of the shares —property emanating from the corporation and owned by the stockholders—as by the corporate property. An excise tax on corporations measured in this way is and has been in force in Massachusetts for many years.

Commonwealth v. *Hamilton Mfg. Co.*, 12 Allen 298 (1866).

Since Congress cannot tax corporate property directly without apportionment, the presumption arising from the nature of this Federal excise tax is rather that some measure other than the value of the property of the corporation was adopted by Congress.

The nature of this tax also furnishes no support for the adoption of the broad, flexible construction of the statute advocated by the Government under which the Commissioner of Internal Revenue is to value "the entire potentiality of the corporation to profit by the exercise of its corporate franchise." The nature of a tax

statute is such as to require a measure of tax which is both definite and uniform for all taxpayers. The chief characteristic of the broad, flexible interpretation of the statute is its indefiniteness and the possibility which it affords of the actual use of different measures of tax for different corporations (see *infra*, p. 75). The fact that the tax must be imposed on many corporations and be applied to an infinite variety of situations furnishes no basis for an indefinite and vague construction of the statute. No matter how many corporations are subject to the tax, the measure must be both ascertainable and uniform. The evidence which the Commissioner may consider in valuing this definite and uniform measure may, however, assume any form.

This broad flexible construction of the statute was apparently adopted by the Court in *Central Union Trust Co.* v. *Edwards*, 287 Fed. 324 (certiorari denied 262 U. S. 744), *a case in which the distinction here made between assets and shares was not presented to the Court*, both parties agreeing that the tax should be measured by asset values.

In that case the stock of the Trust Company had a book value of over $400 per share and had sold during the preceding year at an average market price of $788.75 per share. No good will was carried on the books. Dividends for five years past had been over 50% per annum. In

assessing the capital stock tax the Commissioner used as the basis of the assessment "fair value of the total capital stock, *i. e.,* 50,000 shares at $575.97 per share."

The taxpayer claimed that the capital stock tax should be based upon the capital, surplus and undivided profits as shown by its books (the accuracy of which was not challenged), *i. e.,* the tangible corporate assets. The Commissioner of Internal Revenue asserted the right to base the tax on a larger amount arrived at by taking the outstanding shares of stock at $575.97 per share, this figure apparently being an estimate of the fair average value of each share based upon a consideration of the past earnings of the corporation, its record of dividends, and the sales of stock, which were private sales and few in number.

In supporting this assessment before the Court, the Collector contended that the aggregate value determined by the Commissioner on a share basis fairly measured the value of the corporate assets tangible and intangible. Although the Commissioner of Internal Revenue made the assessment on a share basis, both the Collector and the taxpayer contended that the tax should be measured by the value of corporate assets. The taxpayer contended that only tangible assets shown by its books should be included. The Collector

contended that intangible assets at a valuation should also be included.

The Circuit Court of Appeals stated the issue as follows:

> "This reduces the present inquiry to the question whether Congress meant that, in measuring this excise tax, regard should be had only to what the corporation owned in its corporate capacity, and capable of admeasurement permitting entry on its book of account, *i. e.,* its tangible assets, or whether there should be taken into consideration the public opinion, reflected by the open market, of what it was worth to share in the handling of those tangible assets, *i. e.,* its good will, good management, and established capacity for earning profit" (p. 326).

That Court concluded that the Commissioner of Internal Revenue is permitted *and required* to consider not only paid in capital, surplus and undivided profits but earnings and market values of shares, thereby valuing the intangible as well as the tangible assets.

Both parties in that case proceeded under the assumption, and, therefore, the Court itself proceeded upon the assumption, that corporate *assets of some kind* were to be valued, so that the contention of claimant in this case that the capital stock tax is to be measured by valuation of shares of stock was not considered by the Court.

The use of share values as the measure of this Federal corporate excise tax is entirely consistent with the nature of the tax. Such stock represents the entire beneficial interest in the corporation. The value of such stock is the public estimation of the worth of the right to participate in the results of the corporate enterprise under all the existing circumstances. This value furnishes a measure having a natural and reasonable relation to the corporate enterprise and a measure which Congress might well deem it wise to adopt for a tax of this kind.

Corporate excise taxes imposed by State Legislatures have been measured by the market value of the shares of capital stock. Such a tax has been in force in Massachusetts since 1864, with the sanction of the Massachusetts Courts, approved by this Court.

Commonwealth v. *Hamilton Mfg. Co.*, 12 Allen 298 (1866).

Hamilton Co. v. *Massachusetts*, 6 Wall. 632 (1867).

National Bank of Commerce v. *New Bedford*, 175 Mass. 257 (1900).

The Delaware Railroad Tax, 18 Wall. 206 (1873).

The Treasury in administering the 1916 capital stock tax law initially adopted the position that the measure of the tax was the fair

average value of the shares of stock and adhered to this position for some two years (*Art. 6, Reg. 38*). The Treasury thus recognized clearly that the use of such a measure for a Federal corporate excise tax was natural, reasonable and proper.

The construction of the statute which appellant urges is thus entirely in accord with the general nature and purpose of the statute.

E. Measured by the value of shares of stock, the capital stock tax is constitutional; measured by the value of assets it is in substance an unapportioned direct tax and of doubtful constitutionality.

Where the meaning of a statute is doubtful, the Court will not adopt a construction which raises grave constitutional doubts when another construction avoids them.

> *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366 (1909).

The contention that the measure of the tax is a valuation of corporate assets raises a constitutional question. A corporate excise tax based on a valuation of shares is of undoubted constitutionality.

Congress has, of course, no power to levy a direct tax without apportioning the tax among the several states according to their respective numbers (*Article I, Section 2, Paragraph 3* of

Constitution). A tax on property is a direct tax, invalid unless apportioned.

Pollock v. *Farmers Loan & Trust Co.*, 157 U. S. 429 (1895).

It may be argued that the capital stock tax, even though construed to be a tax measured by the value of the corporation's assets, business and property, is valid as an excise tax imposed only upon corporations carrying on or doing business, and not a burden on property merely because of its ownership.

Flint v. *Stone Tracy Co.*, 220 U. S. 107 (1911).

It would seem, however, that the Court must look at the substance of the matter as it did in the *Child Labor Tax* case (*Bailey* v. *Drexel Furniture Company*), 259 U. S. 20 (1922), and recognize that the tax so administered would be in effect a direct tax on corporate assets, and that though called an excise tax by Congress it would not differ essentially from a direct tax. The sole object and purpose of most corporations is to carry on or do business, and there is no other reason or justification for their existence or for their ownership of property. In most cases the tax on their property would thus be a burden on property merely by reason of its ownership.

A tax on farm lands would be a direct tax and would be void unless apportioned. Would such

a tax be saved if it were described as a tax on "doing business as a farmer" measured by the value of the farm lands, these being valuable only for farming purposes? Paraphrasing the language in *Child Labor Tax* case (*supra*), the Court might well say:

> Grant the validity of this law and all that Congress would need to do hereafter in seeking to impose direct taxes without apportionment among the states, as required by the Constitution, would be to enact a law levying a tax measured by asset values but not due where the property owners do not carry on the business in which such property is ordinarily employed. To give such magic to the exemption of those not engaged in business would be to break down the constitutional requirement that direct taxes be apportioned among the several states according to their respective numbers.

The decision in *Flint* vs. *Stone Tracy Co.* (*supra*) sustaining a corporation excise tax, measured by income, although an income tax would have been invalid under *Pollock case* (*supra*) as an unapportioned direct tax, should not be extended to validate an unapportioned tax measured directly by asset values. That would make almost wholly ineffective the Constitutional requirement that direct taxes be apportioned.

It is common knowledge that three of the largest American mining corporations (Chile Exploration Company, Braden Copper Company, and Cerro de Pasco Copper Corporation) operate solely in South America and that practically their entire physical assets and mining property are located outside of the United States; and the valuable natural resources of other domestic corporations are scattered over other continents, beyond the Federal taxing power. Direct taxes could not be imposed on such assets outside the United States.

Congress cannot levy unapportioned direct taxes on property, and cannot tax property located without the United States, and cannot accomplish these results under the guise of an excise tax on the privilege of doing business in the corporate capacity, differing in no substantial respect from a direct tax. The contention that the capital stock tax is measured by a valuation of assets thus raises a grave constitutional question.

The capital stock tax measured by share values is not a tax on the owners of the shares, hence in no sense is it an unapportioned direct tax. It is a tax on the corporation for the privilege of doing business measured by the actual value of its shares, a measure bearing a close and reasonable relation to the corporate business done and constituting the public estimation of the value of the right to participate in it. A corporation ex-

cise tax based upon the value of the shares of stock of the corporation is clearly constitutional, as is shown by *Hamilton Company* v. *Massachusetts,* 6 Wall. 632 (1867). That decision sustained a Massachusetts statute imposing an excise tax on corporations based on the market value of the shares of capital stock.

See also

The Delaware Railroad Tax, 18 Wall. 206 (1873).

These constitutional considerations furnish an additional ground for holding that the statutory measure of the capital tax is a valuation of the shares of stock rather than a valuation of the assets, property or business of the corporation.

II.

The fair average value of the shares of stock is primarily determined from market transactions when available in sufficient volume.

Under appellant's construction of the statute, the ultimate fact to be established in every case is the fair average value of the shares of stock. This value is to be established in the ordinary way just as it would be established for any other purpose. The most direct and persuasive evidence of such fair average value is afforded by the record of sales of such shares. In this case such sales in large volume on almost every business day of the critical year establish the fair average value of the shares of stock for that period as $34,803,608.99, the amount reported by appellant (Findings 5 to 8). The assessment by the Commissioner based upon a valuation of corporate assets amounting to $55,833,541.66 is thus excessive and invalid.

It will scarcely be controverted that "value" when applied without qualification to property, means market value, that market value is fair and that an average of market values gives the fair average value of the property.

Fox v. *Phelps,* 17 Wend. N. Y. 393, 407 (1837).

Hetland v. *Bilstad,* 140 Ia. 411 (1908).

Palmer v. *Penobscot Lumbering Association,* 90 Me. 193 (1897).

Schley v. *Montgomery County,* 106 Md. 407 (1907).

Duncan v. *Landis,* 106 Fed. 839, 862 (1901).

Advisory Tax Board Recommendation 57, Internal Revenue Bulletin, Cumulative Bulletin 1919, p. 40.

The best evidence of the fair market value of shares of stock is the record of sales of such stock and where a satisfactory record of sales exists, that record is controlling evidence of the fair market value of the stock.

People ex rel. Knickerbocker Fire Insurance Co. v. *Coleman,* 107 N. Y. 541 (1887).

Treasury Regulations 63, Revised 1922, Articles 13 and 14, dealing with valuation of stock for Federal estate tax purposes.

Advisory Tax Board Memorandum 73, Internal Revenue Bulletin, Cumulative Bulletin 1919, p. 71.

Committee on Appeals and Review Recommendation 33, Internal Revenue Bulletin, Cum. Bul. June, 1920, p. 30.

Where the shares are to be valued, the Courts and the Treasury Department alike adopt the es-

tablished market price as the fair market value rather than the book value or the value of the stock based upon corporate asset values.

National Bank of Commerce v. *New Bedford,* 175 Mass. 257 (1900).

Commonwealth v. *Cary Improvement Co.,* 98 Mass. 19 (1867).

National Bank of Commerce v. *New Bedford,* 155 Mass. 313 (1892).

Schley v. *Montgomery County,* 106 Md. 407 (1907).

Newark v. *Tunis,* 82 N. J. Law, 461 (1911).

Committee on Appeals and Review Recommendation 4837, Internal Revenue Bulletin, Cum. Bul. III-1, p. 39.

Committee on Appeals and Review Recommendation 2771, Internal Revenue Bulletin, Cum. Bul. II-2, p. 18.

In *National Bank of Commerce* v. *New Bedford,* 175 Mass. 257 (1900), the respondent had objected to the exclusion of evidence showing the intrinsic value of the assets as tending to establish the fair cash value of the shares of stock. Holmes, *J.,* for the Court, said:

> "There was an ascertainable sum for which these shares could have been sold on May 1, and that being so, it was useless to prove that the public ought to have been willing to give more. * * *

"But, generally speaking, when a statute requires the 'fair cash value' of property on a certain day to be ascertained, Pub. Sts. c. 13, Sec. 8, it refers to the actual judgment of the public as expressed in the price which some one will pay, not to what the court at a later time may think would have been a wiser opinion. It means the highest price that a normal purchaser, not under peculiar compulsion, will pay at that time to get that thing. * * * But it appears to us that the excess of assets over liabilities is of no importance for that purpose, as it throws no light whatever upon the selling prices of the stock. There was sufficient evidence upon which to form an opinion of the selling price, defined as we have defined it, without the need of resorting to such indirect methods of getting at it, and therefore the attempt to divert the inquiry into a wrong channel was met properly enough by a rejection of the evidence."

A satisfactory record of sales, if available, therefore, directly establishes the fair average value of the shares of stock. This is the ordinary method of valuing shares used by the Courts generally and used by the Treasury in other connections. Congress intended that this method of determining the "fair average value" of the capital stock "for the preceding year" under this statute, should be employed, as is made clear by the House debate quoted at page 42 of this brief.

In cases where there are no sales of stock or where the sales are for any reason unsatisfactory evidence of the fair average value of the stock, the Commissioner of Interna! Revenue must of necessity resort to indirect and secondary evidence of such value. In such cases, he may doubtless take into account the fair value of the corporate assets during the year, the earnings of the corporation, its record of dividend payments, the nature of its business, its future prospects, its management, valuations of the stock for inheritance tax purposes and any other evidence tending to show the fair average value of the stock for the preceding year. In such cases, the value of the corporate assets will undoubtedly be one factor, but in every case it will be the fair average value of the shares which is determined. The Commissioner may well require full information as to property and earnings from corporations the fair average value of whose stock is readily determined from market transactions, so as to be assisted in estimating the proper value in cases in which no such transactions are available. This again was the intention of Congress. Quoting from the debate set forth more fully on page 42 of this brief.

> "Mr. Kitchin: * * * We have put a tax of 50 cents a thousand upon the fair average value of the capital stock.
>
> Mr. Denison: That means the market value?

Mr. Kitchin: When it has a market value, it would be the market value; but some stocks have no market value, and they would have to ascertain what the fair actual value is."

The value of the corporate assets may also be useful to the Commissioner in determining whether or not the record of sales of shares should be accepted as satisfactory evidence of the fair average value of the total stock.

In making such use of asset values, however, it must be recognized that corporate asset values are secondary and unsatisfactory evidence of share values. Assets and shares are not legal equivalents, do not have the same value and cannot be treated as if interchangeable. The value of the shares is affected by many influences which do not affect the value of the assets. It is everyday experience that the two things differ greatly in value.

In this case, resort to secondary evidence is unnecessary. There was a satisfactory record of *bona fide* sales in large volume upon a free and open market. These sales satisfactorily establish the fair average value of the shares of stock. The Government has not disputed this.

It might be assumed from statements of the Court below that appellant contends that the measure of the tax was the fair average value of the shares where there were sales of stock and

that where there were no sales of stock the measure of the tax was the fair value of the corporate assets. Appellant, of course, takes no such position. It contends that in every case the measure of the tax is the fair average value of the shares of stock and that this is to be established in each case in the ordinary manner upon the basis of all the available evidence just as such value would be ascertained for any other purpose.

III.

The Treasury has in practice construed the law as if it measured the tax by (1) assets, (2) shares or (3) capitalized earnings, whichever is higher. This construction of the statute is erroneous, even if presented under the guise of a broad meaning for the term "capital stock".

The issue presented to this point is primarily that between the use of shares and the use of assets as the measure of the tax. There has been no issue between the Government and the appellant as to the method of valuing shares. Appellant takes the position that the statutory measure of the tax is the fair average value of the shares. The court below took the position that the measure of the tax is the fair value of the corporate assets and resources and approved the assessment made solely on that basis.

The Treasury originally adopted appellant's construction of the statute (*Article 6, Regulations 38* set forth in appendix to this brief). Its present interpretation of Section 700 of the Revenue Act of 1924 (identical with Section 1000 of the Revenue Act of 1918, except as to insurance companies), while emphasizing asset values, does not proceed on the basis that "capital stock" means net assets (*Article 15, Regulations 64, 1924 Edition,* set forth in appendix). The Treasury, except in its first regulations, has

carefully refrained from stating what "capital stock" does mean in this statute. It requires a statement of assets at "fair value" showing the net value of the corporate assets at the date of the last balance sheet (Exhibit A, form 707), a statement of sales of shares showing the total value of the shares at the average selling price during the year (Exhibit B, form 707), and a statement of the preceding five years' earnings and dividends showing a total value determined by capitalization of earnings (Exhibit C, form 707).

Form 707, 1925 return, continues an instruction which has appeared on several forms reading:

> "If the reconstructed book value shown by Exhibit A, the market value shown by Exhibit B, or the valuation reflected by Exhibit C is greater than the valuation returned by the taxpayer, a comprehensive statement showing any extraordinary conditions which are relied on in support of the valuation claimed must be submitted."

In practice therefore the Treasury requires the statement of three different amounts arrived at in different ways and representing different things and, except under extraordinary and unspecified conditions, measures the tax by the highest of these amounts. It thus construes this statute in such a way as to permit it to tax ap-

pellant on the basis of corporate assets, some other corporation on the basis of share values and a third corporation on the basis of a capitalization of earnings.

Presumably the Government will not take the position in this case that the Commissioner of Internal Revenue has discretion under the statute to tax a corporation either on the fair value of its net assets, the average value of its shares of stock as shown by sales thereof, or an amount determined by capitalizing past earnings, although this is the practice of the Treasury. Such an argument would too plainly set up an alternative measure clearly not contemplated by the statute. The statute establishes a single standard —a single thing to be valued—which must be the same for all taxpayers.

The Government defends the results of this alternative practice, however, by contending that the one of the three amounts selected by the Commissioner in a particular case must be accepted by the taxpayer as a proper determination of the "fair value". In order to reach this result, the Government attributes to the term "capital stock" a vague, elastic or flexible meaning so broad as to leave taxpayers no basis for objecting to anything which the Commissioner may do within very wide limits. This enlarged concept, well characterized as "cynical" by the Court in *Cen-*

tral Union Trust Company case (*supra*), is called there and in the decision below "the entire potentiality of the corporation to profit by the exercise of its corporate franchise". This generality seems to be as definite a statement of its concept of what is to be valued, as the Government has formulated after eight years of administration of the law.

The Government defended the capital stock tax assessment made in *Central Union Trust Company* v. *Edwards, supra,* on the basis of a capitalization of earnings as a proper determination of the "fair value" under its broad, flexible theory. The Circuit Court of Appeals said:

> "The remarks made by the 'committee chairman in charge of the bill' * * * are available in Cong. Rec. 64th Cong. 1st Sess. September 7, 1916, and they satisfy us that the act was passed with the intent of permitting, and indeed *compelling,* the assessor to consider, not only paid-in capital, surplus and undivided profits, *but earnings and market value of shares.*" (Italics ours.)

It is by no means clear that this decision meant to approve the alternative practice of the Commissioner. The assessment was originally based on share values which gave the highest tax, but a refund was made and the assessment before the Court was based on a capitalization of earnings, and was in fact about midway between share value and asset value.

In the present case the Government defends an assessment based on asset values as a proper determination of the "fair value" under the same broad, flexible theory. The Court below, in sustaining this assessment, says:

> "Obviously, when given effect it precludes the idea of earnings of the corporations as furnishing the basis of computation for the tax. It precludes a consideration of profits and discloses an intended purpose to use assets—at least assets represented by surplus and undivided profits—as one factor in arriving at the value of capital stock. * * * When Congress expressly included surplus and undivided profits in the estimation of the capital stock of a corporation, it necessarily excluded resort to the market value of the shares of stock of the corporation, even when available, as the one and only basis of assessing an excise tax against the same, and intentionally predicated the assessment of the tax upon an asset basis."

Thus, one Court says resort to earnings and market value of shares as well as capital, surplus and undivided profits is compelled by the statute; the other says resort to earnings is forbidden by the statute, that the tax is predicated on an asset basis and that an assessment wholly disregarding the market value of the shares is proper. The two decisions are thus inconsistent in their reasoning. This is natural in view of the fact that an assessment made on one basis was sustained in the

Central Union Trust Company case, and an assessment made on a different basis was sustained below.

Appellant's position is that the statute prescribes a single measure of tax, inflexible in the sense that it is the same for all taxpayers. Furthermore, this measure must be capable of definition and the thing to be valued must be identifiable as an ordinary business concept, a "business and financial reality", susceptible of valuation by ordinary methods. Once the thing to be valued is established and defined, there is ample room for flexibility and for the exercise of judgment by the Commissioner in determining the weight, relevancy and admissibility of the evidence of value which may be of infinite variety. The Commissioner's interpretation of the statute as imposing an alternative basis is wholly inadmissible and cannot be supported by adoption of such a broad meaning for "capital stock" as to permit the actual use of alternative and distinct meanings. With reference to a somewhat similar construction of a New York property tax law, the New York Court of Appeals said:

> "The right asserted is a discretion in the assessors at their free will to assess corporations upon and at the value of their capital and surplus, or upon and at the value of the share stock independently of established facts and whenever they please. The law gives them no such discretion. How it has been

exercised and how destructively to the rights of taxpayers may be seen by comparing the action in this case with that in one of the cases which we have reviewed. Where the share stock was selling at ninety, and so below par, the assessors refused to take that value and went to the company's books in search of a larger one, which they found and adopted. Here, where the actual value of capital and surplus is established so that they frankly admit the fact, they calmly disregard it and fly to the larger value of the share stock. The statute has given them no such right. *They are not lawless rovers, wandering among corporations at will, but regular officers bound by discipline and controlled by the law, and whose discretion exists within fixed and definite limits.*"

People ex rel. Union Trust Company v. *Coleman,* 126 N. Y. 433, 449 (1891).

If the test laid down by the court in *Central Union Trust Company* v. *Edwards* is applied here, it clearly shows that the assessment based solely on net assets and without reference to the market value of the shares or other evidence is excessive. There the Court held that the Commissioner was compelled to *consider* not only paid-in capital, surplus and undivided profits, but also earnings and market value of shares. "Consider" must mean to give some weight to such evidence in the final result. The assessment there approved approxi-

mated an average of the value of the assets the market value of the shares and the capitalized earnings value. Here the Commissioner of Internal Revenue gave no weight whatsoever to the market value of the shares or to the secondary evidence of value shown in the exhibits attached to the stipulation of facts below which showed that the record of earnings, the record of dividends and the asset values at cost all substantially supported the amount directly determined from the selling value of the shares of stock. Such an assessment is clearly excessive and erroneous under the reasoning of *Central Union Trust Company* v. *Edwards* (*supra*).

The decision of the Court below was that "capital stock" meant corporate assets or resources, and is clearly wrong. It is not the interpretation of the statute adopted by the Commissioner of Internal Revenue. It is not the interpretation of the statute made in *Central Union Trust Company* v. *Edwards* (*supra*). It gives no significance to the phrase "fair average value * * * for the preceding year". It wholly disregards the contrast between "capital stock", the measure for domestic corporations and "capital employed", the measure for foreign corporations. It ignores the significant change from "capital" in the bankers tax to "capital stock" in the capital stock tax. It makes the special provisions as to mutual insurance companies surplusage. It ignores the

congressional debate in connection with the 1916 Act clearly showing that resort to the market value of the shares was the primary intent of Congress. It ignores the refusal of the 65th Congress to change the measure from "capital stock" to "net assets shown by its books". It attributes to Congress an intention to burden the Treasury and the taxpayers with the impracticable task of valuing all corporate assets in the country annually or at shorter intervals. It raises constitutional questions. This interpretation of the statute cannot be sustained.

It is equally clear that the broad, flexible interpretation advanced to justify the practice of the Commissioner in using assets, shares or capitalized earnings as alternative bases is incorrect. The statute clearly requires the same thing to be valued for all corporations, and the effort to attribute to the words "capital stock" a meaning flexible enough to permit the use of alternative bases merely results in vagueness, uncertainty and the unsuccessful attempt to reach some elusive thing hitherto unrecognized as a business and financial reality.

An interpretation of the statute to the effect that "capital stock" means shares of stock to be valued in the ordinary way gives ordinary significance to the phrase "fair average value for the preceding year", gives full effect to the contrast between "capital stock" and "capital",

gives a meaning to the special provision as to mutual insurance companies, conforms precisely to the 1916 congressional debate and the 1918 legislative history, gives proper weight and significance to the reference to surplus and undivided profits, greatly simplifies a difficult administrative problem, avoids constitutional difficulties and results in an understandable and definable measure of tax consonant with the general nature and purpose of the statute, and applicable with uniformity and certainty to all domestic corporations.

The decision should be reversed with directions to enter judgment for the appellant for the full amount sued for.

Respectfully submitted,

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Appendix.

1. Article 6, Treasury Regulations No. 38, issued October 9, 1916, under Sec. 407, Revenue Act of 1916:

"United States corporations.

Art. 6. Sec. 1. *Companies or associations organized in the United States for profit.*—The tax on companies or associations having *a capital stock represented by shares* is imposed on the fair average value for the preceding year and *not the face or par value* of the capital stock. The fair value of the capital stock shall be ascertained as follows:

"*Stock* listed on exchange.

"(*a*) *Case I.*—If the *stock is listed on any exchange* its fair value will be determined by adding the *quoted highest bid price* for the stock on the last business day of each month during the preceding fiscal year (or if no bid price was quoted on the last day then the latest day in the month on which a bid was quoted), and dividing by 12, *the result being the average bid price per share for that year.*

"*Stock* not listed, but of which sales have been made.

"(*b*) *Case II.*—If the *stock* is *not listed* on any exchange, but *sales thereof* have been actually made, and the *price paid for the stock* is known to the officer making the return, or

can be discovered by him, *the average price at which sales were made* during the preceding fiscal year shall be the determining factor in ascertaining the fair value per share.

(*In the foregoing two cases the actual fair value of the stock is ascertainable from the facts without the necessity of making an estimate.*)

"Cases in which fair average value of stock shall be estimated.

"(*c*) *Case III.—If Case I and Case II can not be applied, viz.,* the stock is not listed on any exchange, and no actual sales have been made during the preceding fiscal year, or if the price at which sales have been made is not known to the officer making the return, the fair average value of the capital stock shall be estimated, and the surplus and undivided profits for the preceding fiscal year will be taken into consideration as required by the statute, as well as the nature of the business, its earning capacity and average dividends paid, or profits earned during the preceding five years.

"Fair value of total *capital stock outstanding.*

"(*d*) The *fair value per share* ascertained or estimated as above multiplied by the number of shares outstanding will give the fair value of the *stock* for taxation purposes. * * *" (Italics ours.)

2. *Article 15, Treasury Regulations 64—1924 Edition.*

"Art 15. *Fair average value of capital stock.*—The fair average value of the capital stock for the purpose of determining the amount of the capital stock tax must not be confused with the market value of the shares of stock where it may be necessary to determine such value under other provisions of the revenue laws. The fair average value of the capital stock, the statutory measure of the tax, is not necessarily the book value or the value based on prices realized in current sales of shares of stock or the value determined by capitalization of earnings.

"Form 707 provides Exhibit A for the book or fair value of the assets, Exhibit B for the market value of the shares, and Exhibit C for the value of the capital stock based on the capitalized earnings. All information called for must be given in every case where it is procurable. The fair average value of the capital stock of a corporation and the tax payable thereon shall be determined from a consideration of the data contained in the return as well as all elements and factors affecting values, which should be harmonized so far as possible in the ultimate fair value found. Fair value is required irrespective of the exhibit used or the method employed in its determination.

"Exhibit A.—The character of the assets is probably the most important factor in de-

termining the reliability of the value reflected by this exhibit as being indicative of the fair value of the capital stock. *If the market value of the assets be established the fair value of the capital stock is held to be not materially less than the fair market value of the net assets. Attempts to average the assets as a means of estimating the fair average value of the capital stock are not permitted.*

"Exhibit B.—The market is regarded as a factor, but only of importance when the underlying factors upon which the market has been established are sound in all essential particulars.

"Exhibit C.—The weight attaching to this exhibit is largely dependent upon the nature of the business and character of the assets. In capitalizing the net earnings of the corporation, which should reflect the true earning capacity, the officers should use a rate fairly representing the conditions obtaining in the trade and in the locality, with due regard to other important factors, including the worth of money. But such fair value must not be greatly at variance with the reconstructed book value shown by Exhibit A, unless the corporation is materially affected by extraordinary conditions which support a lower valuation. In any such case a full explanation must accompany the return. The commissioner will estimate the fair value of the capital stock in cases regarded as involving any understatement or undervaluation.

"The fair value of the capital stock, as provided under section 700 (*a*) (1) of the Revenue Act of 1924, and invested capital are not necessarily the same.

"*For the purpose of capital-stock tax the fair value of the capital stock is estimated, and is predicated on present values, including actual appreciation of property, whether realized or unrealized, and such intangible assets as good will, trade-marks, and patents to the extent reflected by the earning power,* whereas invested capital is based upon the actual investment of the stockholders in the corporation, irrespective of the present value of its assets. *In the case of the capital-stock tax the fair value looks to the present net value of the assets,* irrespective of the amount of the investment of the stockholders." (Italics ours.)

Note.—Sec. 700 of Revenue Act of 1924 is identical with Section 1000 of Revenue Act of 1918, except for exemption of insurance companies.

3. *Extract from First Annual Report of the Tax Simplification Board (Sec. 1327, Rev. Act 1921) dated Dec. 2, 1922.*

"Another factor involving exceptional difficulty is found in the administration of the provisions of the revenue acts which allow a deduction for the depletion of minerals and other natural resources. This, also, has the

appearance of justice and comparative simplicity. What is actually involved, however, is the valuation as of March 1, 1913, or other basic date, of all the natural resources of the country which are under operation for profit. Most of this property is under the ground and hidden from sight. It must be brought to the surface at varying and uncertain dates in the future, at varying and uncertain costs, and sold on the basis of the market as it exists from time to time in the future. The quantity of property can in but few cases be measured. It can only be approximated, and its value, based upon these uncertain factors, must be reduced to a present sum which, in theory, will be paid by a willing purchaser to a willing seller. The valuation of the railroad properties of the country has been under way for years and that problem is easy as compared with the valuation problem incident to the calculation of the allowance for depletion. In view of the time that has been consumed in the valuation of the railroads, and in further view of the much greater difficulty encountered in valuation of natural resources, it is apparent that in the time at its command the Bureau of Internal Revenue can not do better than make a very rough approximation of the value of natural resources."

INDEX

AUTHORITIES CITED

In the Supreme Court of the United States

RAY CONSOLIDATED COPPER COMPANY, a corporation, appellant
v.
THE UNITED STATES OF AMERICA

No. 443

ON APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

STATEMENT

The appellant brought action in the Court of Claims to recover a capital stock tax alleged to have been illegally assessed and collected under the Revenue Act of 1918. The case was considered upon an amended petition and an agreed statement of facts. The Court of Claims dismissed the petition. The company thereupon appealed to this court.

Section 1000 of the Revenue Act of 1918, 40 Stat. 1057, 1126, under which the tax was laid, provides:

> Every domestic corporation shall pay annually a special excise tax with respect to carrying on or doing business, equivalent to $1 for each $1,000 of so much of the fair

> average value of its capital stock for the preceding year ending June 30 as is in excess of $5,000. In estimating the value of the capital stock the surplus and undivided profits shall be included.

The company contended that the fair average value of its capital stock for the preceding year should be computed by multiplying the total number of shares of its capital stock by the average price which dealers upon the New York Stock Exchange paid for its shares during the preceding year. It made a payment of taxes upon that basis.

The Commissioner of Internal Revenue declined to accept the company's contention and assessed and collected the tax upon the basis of the net assets of the corporation. He subsequently modified the computation as originally made, giving more weight to depreciation, and granted a refund of a portion of the amount collected. There is now no question as to the accuracy of his computation if, as the Government submits, the statute lays a tax based upon the fair average value of the net assets of the corporation itself rather than upon the average market value of the shares of stock, which are not owned by the corporation but by its stockholders.

ARGUMENT

I

The tax is imposed on the privilege of carrying on or doing business in a corporate capacity and is measured by the fair average value of the corporation's capital stock. In the estimate of the value of the capital stock there should be included every factor giving value to the privilege upon which the tax is imposed.

The capital stock tax imposed by the section of the Revenue Act of 1918 involved in this case is a special excise tax with respect to the "carrying on or doing business." The section provides:

(1) "Every domestic corporation" shall pay

(2) "A special excise tax with respect to carrying on or doing business" measured by

(3) "The fair average value of *its* capital stock for the preceding year."

(4) "In estimating the value of capital stock the surplus and undivided profits shall be included."

It will be first noted that the tax is one for the privilege of doing business on the part of the corporation. It is thus an excise tax (as is plainly stated in the Act) and is *not* a tax upon the shares of stock in the hands of the shareholders, nor is it a tax upon the property of the corporation, but an excise tax upon the *corporation* for the privilege of doing business. As pointed out in *Central Union Trust Co.* v. *Edwards*, 282 Fed. 1008, 1009:

> The tax imposed by the statute is not a property tax. It is an excise imposed

> upon the privilege of doing business in corporate form, as a going concern. The value of this privilege is the obvious way to measure the tax.

To the same effect are *Washington Water Power Co.* v. *United States*, 56 Ct. Claims 76; *National Paper & Type Co.* v. *Edwards*, 292 Fed. 635.

Any reasonable measure of the value of the privilege may be used by Congress as a basis for the computation of the tax. Under the Corporation Excise Tax Act of 1909, the measure used was the net income of the corporation. Although the Sixteenth Amendment had not been adopted at that time, this court held in *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, that income was not being taxed, but was only used as a measure of a tax upon the privilege of carrying on business in a corporate capacity, and concluded that net income was a reasonable measure of such privilege. The court said (pp. 165, 166):

> Conceding the power of Congress to tax the business activities of private corporations, including, as in this case, the privilege of carrying on business in a corporate capacity, the tax must be measured by some standard, and none can be chosen which will operate with absolute justice and equity upon all corporations. Some corporations do a large business upon a small amount of capital; others with a small business may have a large capital. A tax upon the amount of business done might operate as unequally as a measure of excise as it is

> alleged the measure of income from all sources does. Nor can it be justly said that investments have no real relation to the business transacted by a corporation. The possession of large assets is a business advantage of great value; it may give credit which will result in more economical business methods; it may give a standing which shall facilitate purchases; it may enable the corporation to enlarge the field of its activities and in many ways give it business standing and prestige.

On October 22, 1914, Congress enacted "An Act to increase the internal revenue," etc. (38 Stat. 745). Section 3 (p. 750) imposed a tax on the *privilege of carrying on a banking business.* Its terms pertinent to this inquiry were as follows:

> SEC. 3. That on and after November first, nineteen hundred and fourteen, special taxes shall be, and hereby are, imposed annually as follows, that is to say:
>
> First. Bankers shall pay $1 for each $1,000 of *capital used or employed,* and in *estimating* capital surplus *and undivided profits shall be included.* The amount of such annual tax shall in all cases be computed on the basis of the *capital, surplus, and undivided profits for the preceding fiscal year.* [Italics ours.]

Thus we find Congress abandoning net income as the measurement of an excise tax and adopting a more comprehensive standard; that is, "capital used or employed."

The Bankers Tax Act above was the forerunner of section 407 of the Revenue Act of 1916. In drafting the revenue bill of 1916 the House of Representatives retained the tax on bankers in substantially the same terms as had theretofore appeared in the Act of October 22, 1914. When the bill reached the Senate it was amended to extend to and include *all corporations,* and the measure of the tax was made substantially the same as in the Act of 1914 on bankers. The Senate amendment, in so far as pertinent to this inquiry, provided as follows:

> Corporations, * * * shall pay 50 cents for each $1,000 of capital stock, surplus, and undivided profits used in any of the activities or functions of their business, including such sums of capital stock, surplus, and undivided profits as may be invested in or loaned upon stock, bonds, mortgages, real estate, or other securities. The amount of such annual tax shall in all cases be computed on the basis of the capital, surplus, and undivided profits for the preceding fiscal year * * *.
>
> (See Senate Committee print, H. R. 16763, 64th Congress, 1st session, p. 99; conference committee print, H. R. 16763, 64th Congress, 1st session, p. 122.)

This amendment was not concurred in by the House managers in so far as the measure of the tax was concerned. To that extent it was amended so as to provide that the tax upon this privilege, which was the subject of the tax, should be

measured by " the fair value of its capital stock " and that " in *estimating* the value of capital stock the surplus and undivided profits shall be *included.*" In thus framing the statute the House managers took a long step forward in seeking to reach not only the former values (as measured in the Revenue Act of October 22, 1914), but also the additional value just referred to above—and by this action in adopting a broader term, to give indisputable evidence that a broader standard of measurement was contemplated. In the form prepared by the House managers the Senate agreed (see conference report H. R. 16763, pp. 14 and 15), and in that form it passed into law.

As will be readily seen, this Senate amendment was a much more restricted and narrow provision than that finally adopted. It meant a narrower standard of measurement of the privilege to be taxed. As stated above, the conference adopted the broader and more general provision and omitted the words " used in any of the activities or functions of their business " as well as the provision which specifically included the investments of capital stock, surplus, and undivided profits in securities.

As this court decided in *United States* v. *St. Paul, M. & M. Ry. Co.,* 247 U. S. 310, reports of a congressional committee in charge of a bill subsequently enacted into law, and statements made by the committee chairman, may be resorted to in

order to throw light upon the construction of a statute. This principle was applied by the court in *Central Union Trust Co.* v. *Edwards,* 282 Fed. 1008, where the legislative discussion relied upon by the appellant in the instant case was being considered. The court said (p. 1010):

> After the Act of September 8, 1916, had received from the Commissioner of Internal Revenue the construction now contended for by the defendant, Congress enacted the Revenue Act of 1918 containing section 1000a in the same language as of section 407 of the Act of September 8, 1916, except that the rate was doubled and the deduction lowered. The Senate had amended the House bill so as to make the basis of the tax the amount of the net assets shown on the books as of the close of the preceding income tax year. This amendment was rejected by the House, and the Senate receded from it in conference. This is persuasive that the words "fair average value of the capital stock" were not thought by that Congress to be synonymous with the net worth of physical assets as shown by the corporate books.

When that case reached the Circuit Court of Appeals for the Second Circuit, the legislative discussion was again considered, and that court said (287 Fed. 324, 328):

> The remarks made by the "committee chairman in charge" of the bill (*United States* v. *St. Paul,* M. & M. Ry. Co., 247 U. S. 310, 318), are available in Con-

> gressional Record, Sixty-fourth Congress, first session, September 7, 1916, and they satisfy us that the act was passed with the intent of permitting, and indeed compelling, the assessor to consider, not only paid-in capital, surplus, and undivided profits, but earnings and market value of shares. Such a method of assessment necessarily implies for the words "capital stock" an enlarged meaning, which, if it does not connote the somewhat cynical view of the Wisconsin court, supra, certainly goes so far as to regard as "fair" an examination of "the entire potentiality of the corporation to profit by the exercise of its corporate franchise."

It is to be noted that in all the measures used by Congress in capital stock taxes, the property of the corporation has been used as the measure of the value of the privilege and not the property of the stockholders. More detailed reference will be made at a later point in this brief to the history of the Federal capital stock tax.

II

The meaning of the term "capital stock" as used in the section of the Revenue Act of 1918 here involved is best understood by a consideration of the legislative history of the act and the context of the provision in question.

The term "capital stock" is ambiguous only when used disassociated from its context. It has been used in so many different ways that of necessity the intent must be determined by the

object sought to be attained in its use. A glance at the law dictionaries will show the many different meanings that have attached to it. It has been held to mean " capital," " the authorized amount of capital," " the amount of capital subscribed," " *assets,*" " capital paid in," " property belonging to the corporations," according to the context, and it has been distinguished from each of these.

The courts have generally held that there are two kinds of capital stock—two separate, distinct properties:

First. Capital stock of the corporation; capital stock in the hands of the corporation; the ownership of the corporation in *its* capital stock; capital stock which is the property of the corporation and out of which shares are carved.

Second. Capital stock of the shareholders—the proprietary interest of the individual stockholder in shares of stock.

It is obvious that in order to ascertain the meaning of "capital stock" as used by Congress in the Revenue Act of 1918, reference must be had to the purpose of the taxing act, the context of the act itself, and the legislative history of the act evidencing the intent of Congress.

Before passing to the consideration of the specific taxing act in question we call attention to the fundamental purpose underlying taxing statutes—that a taxing statute is drafted with a view of securing as much revenue as possible. Bear-

ing this principle in mind, let us briefly review the history of federal tax legislation relating to taxation of corporations.

III

The history of federal legislation relating to the taxation of corporations shows a continuous tendency upon the part of Congress to extend the standard of measurement by which the amount of tax is determined, always with a view to augmenting the revenue to be derived from the taxation of corporations.

In 1895 this court decided the case of *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 439. It held that the statute of 1894 imposing a tax on the income derived from real estate and invested personal property, by virtue of the bare ownership of such property, was unconstitutional in that it was a direct tax without apportionment. A rehearing of this case was had and the Chief Justice, speaking for the court, summarized the effect of that discussion as follows (158 U. S. 601, 635):

> We have considered the act only in respect of the tax on income derived from real estate, and from invested personal property, and have *not* commented on so much of it as bears on gains or profits from business, *privileges*, or employments, in view of the instances in which taxation on business, privileges, or employments has assumed the guise *of an excise tax* and has been sustained as such.

It was made clear by the *Pollock case* and *Knowlton* v. *Moore* (178 U. S. 41, 80) that a tax

is a direct tax when imposed upon property solely by reason of its ownership, but that such a tax is not a direct tax when imposed on the use or employment of property. " Within the category of *indirect* taxation * * * is embraced a tax upon business done in a corporate capacity * * *." (*Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 150.)

(*a*) *Corporation Excise Tax Act of 1909.*

On August 5, 1909, Congress enacted the " Corporation Excise Tax Act " (36 Stat., c. 6, 11, 112-117). In section 38 it provided:

> SEC. 38. That every corporation * * * organized for profit and having a capital stock represented by shares * * * shall be subject to pay annually a *special excise* tax with respect to the carrying on or doing business by such corporation * * * equivalent to one per centum upon the *entire net income* * * * received by it *from all sources* during such year * * *. [Italics ours.]

The Act was upheld and discussed in an exhaustive manner by the Supreme Court in *Flint* v. *Stone Tracy Co., supra.* Speaking to the point just discussed, the court said (220 U. S. at 146, 147):

> This tax, it is expressly stated, is to be equivalent to one per centum of the entire net income * * * received from *all sources* during the year—this is the measure of the tax explicitly adopted by the

> statute. The income is not limited to such as is received from property used in the business, strictly speaking, but is expressly declared to be upon the entire net income * * *. In other words, the tax is imposed upon the doing of business of the character described, and the measure of the tax is to be the income * * * received *not only from property used in business* but from every source. This view of the measure of the tax is strengthened when we note that as to organizations under the laws of foreign countries the amount of net income * * * includes that received from business transacted *and capital invested* in the United States, the Territories, Alaska, and the District of Columbia. * * * The evident purpose is to secure a return of the entire income, with certain allowances and deductions which *do not suggest a restriction to income derived* from property actively engaged in the business.

It is apparent that this court has interpreted the intent of Congress to be liberal and broad with respect to elements constituting the value of the privilege taxed. This is further borne out by the language of the court in the same case at page 165, as follows:

> It is therefore well settled by the decisions of this court that when the sovereign authority has exercised the right to tax a legitimate subject of taxation as an exercise of a franchise or privilege, it is no objection

> that the measure of taxation is found in the income produced in part from property which of itself considered is nontaxable. * * * The measure of taxation being the income of the corporation from all sources, as that is but the measure of a privilege tax within the lawful authority of Congress to impose, it is no valid objection that this measure includes, in part at least, property which as such could not be directly taxed.

The court is here taking the broad view of the " measuring rod " by which the tax is determined. Consider the analogy between the contention in the above case and that in the instant case. Here the company has large and valuable assets whose value, because of their probable (or apparent) unproductiveness, or because they are not actively used in the business, are not necessarily reflected in the stock market as evidenced by the sales of stock. The appellant would contend, then, that these assets should not be considered in measuring the value of the capital stock. It is true it does not say it in that manner, but it comes to that inevitably, since appellant contends that only such sales on the market should be considered. These sales reflect the business done, income produced, dividends paid, and a thousand other nebulous influences which affect the market prices of stock as an earth tremor influences the seismograph. But as we have noted before, and supported by the language of the Supreme Court in the *Stone Tracy*

Company case, Congress is not so much concerned with the amount of business done as with the amount of property which it has to do business with. The latter measures the value of the privilege and the former does not. Stock market prices may be considered as one evidence of value, but they are at best uncertain. A stock may be active or inactive, and the corporation may believe in full publicity or as in the American Sugar Company in Mr. Havemeyer's days, it may believe in secrecy as to the details of its operations. The buying public may know all or it may know nothing. It may buy in the dark or in the daylight.

(b) Bankers Tax Act of October 22, 1914

As we have heretofore shown in the Bankers Tax Act, Congress used as a measure of the tax "capital used or employed." This standard is a broader one than that included in the "Corporation Excise Tax Act of 1909," and shows a tendency of Congress to include all elements that would tend to give the privilege value.

(c) Capital Stock Tax Act of September 8, 1916

We have heretofore shown the legislative history of the 1916 Act and have shown that Congress rejected the narrow measure of the tax included in the Senate amendment and adopted a much broader standard which is identical with the meas-

ure adopted in the Revenue Act of 1918 under consideration.

(d) Central Union Trust Co. v. *Edwards*

In the case of *Central Union Trust Company* v. *Edwards,* 287 Fed. 324, the Circuit Court of Appeals for the Second Circuit construed the 1916 Act as meaning that the "fair value of its capital stock" as used in that act included both tangible and intangible assets, such as good will, good management, and established capacity for earning profit. The legislative history of the Act was examined and held to contemplate as a measure of the tax "the entire potentiality of the corporation to profit by the exercise of its corporate franchise." The *Coleman case* and similar State decisions cited by appellant in this case were cited and cast aside as leading to "the belief that 'capital stock' is a term plastic, to say the least, and compelling its interpreter to look first to the context for a meaning that has not been reduced to any rigid formula." The court, in referring to the legislative history of the act, says (287 Fed. 328):

> The remarks made by the "committee chairman in charge" of the bill (*United States* v. *St. Paul, etc., Ry.*, 247 U. S. 310, 318) are available in Congressional Record, Sixty-fourth Congress, first session, September 7, 1916, and they satisfy us that the

act was passed with the intent of permitting, and indeed compelling, the assessor to consider not only paid-in capital, surplus, and undivided profits but earnings and market value of shares.

It should be noted that the court states that market value of shares should be considered, but that they are to be considered in connection with other information available, exactly as is being done in the instant case and not, as is here contended by appellant, taken as conclusive. The reasoning of the court is:

(*a*) This is admittedly an excise or privilege tax.

(*b*) Measured by property.

(1) Whose property? That of

(a) The corporation?

or

(b) Of its shareholders?

(*c*) To answer the above, reference must be had

(1) To the wording of the Act, if clear, and full scope given.

(a) Words as used are frequently short cuts (formulæ) for a permitted meaning.

(b) Is phrase "capital stock" so used in the Act?

(1) No generally accepted meaning.

(2) No authority limiting Congress in any meaning it might place upon phrase.

(3) State courts show a wide diversity of opinion.

(c) Since (b) proves term is plastic, look at context.

(1) "Fair value."

(2) "Estimating fair average value."

Both show book values not intended.

(d) Look at legislative history.

(1) Shows plainly that an enlarged meaning was placed on phrase by Congress, that "fair" means an examination of "the entire potentiality of the corporation to profit by the exercise of its corporate franchise."

(e) *Comparison of the above Acts of 1916 and 1918.*

Section 407 of the Revenue Act of 1916.	*Section 1000 of the Revenue Act of 1918.*
"Every corporation, joint stock company or association, now or hereafter organized in the United States for profit and having a *capital stock* represented by shares * * * shall pay annually a special excise tax with respect to the carrying on or doing business by such corporation * * * equivalent to fifty cents for each $1,000 *of the fair value of its capital stock* and in estimating the value of capital stock the surplus and undivided profits shall be included * * *. The amount of such annual tax shall in all cases be computed on the basis of the *fair average value* of the capital stock for the preceding year * * *."	"Every domestic corporation shall pay annually a special excise tax with respect to carrying on or doing business equivalent to $1 for each $1,000 of so much *of the fair average value of its capital stock* for the preceding year ending June 30 as is in excess of $5,000. In estimating the value of capital stock the surplus and undivided profits shall be included."

The case of *Central Union Trust Company of New York* v. *Edwards, supra,* deciding the meaning of capital stock as used in the 1916 Act is an authority for the same meaning for the 1918 Act since the Acts are substantially identical.

(f) *Regulations under the Revenue Act of 1918 were adopted by the Revenue Act of 1921*

Regulations No. 50, promulgated by the Secretary of the Treasury on May 25, 1920, provides in part as follows:

> ART. 14. *Fair average value of capital stock.*—The fair average value of the capital stock for the purpose of determining the

amount of the capital stock tax must not be confused with the market value of the shares of stock where it may be necessary to determine such value under other provisions of the revenue laws. The fair average value of the capital stock, the statutory basis of the tax, is not necessarily the book value or the value based on prices realized in current sales of shares of stock or even the value, determined by capitalization of earnings, although it may be more directly dependent upon the last. It should usually be capable of appraisal by officers of the corporation having a special knowledge of the affairs of the corporation and general knowledge of the line of business in which it is engaged. Provision is accordingly made in Exhibit C of Form 707 (Revised) for the tentative determination of the fair value of the capital stock by capitalizing the net earnings of the corporation on a percentage basis fixed by its officers as fairly representing the conditions obtaining in the trade and in the locality. But such fair value, except in the case of insurance companies, must not be set at a sum less than the reconstructed book value shown by Exhibit A, unless the corporation is materially affected by extraordinary conditions which support a lower valuation. In any such case a full explanation must accompany the return. The commissioner will estimate the fair value of the capital stock in cases regarded as involving any understatement or undervaluation. * * *

A consideration of this regulation shows that the ruling therein is consistent in every particular with the intent of Congress as outlined in the Revenue Act of 1918.

It is firmly established that regulations, duly promulgated under statutory authority, have the force and effect of law, and, where an interpretation and construction of a statute by an executive department has been long continued and the law uniformly administered, regulations are given great weight by the courts. As was said by this Court in the recent case of *Maryland Casualty Company* v. *United States,* 251 U. S. 342, at page 349:

> * * * It is settled by many recent decisions of this court that a regulation by a department of government, addressed to and reasonably adapted to the enforcement of an act of Congress, the administration of which is confided to such department, has the force and effect of law if it be not in conflict with express statutory provision. *United States* v. *Grimaud,* 220 U. S. 506; *United States* v. *Birdsall,* 233 U. S. 223, 231; *United States* v. *Smull,* 236 U. S. 405, 409, 411; *United States* v. *Morehead,* 243 U. S. 607. * * *

The same principle is further supported by *United States* v. *Eliason,* 16 Pet. 291; *Gratiot* v. *United States,* 4 How. 80, 117; *Ex Parte Reed,* 100 U. S. 13, 23; *United States* v. *Eaton,* 144 U S. 677, 688; *In re Huttman,* 70 Fed. 699, 701.

It is a well-settled principle of law that the reenactment by Congress without change of a

statute which had previously received executive construction is an adoption by Congress of such construction. *United States* v. *Falk*, 204 U. S. 143; *United States* v. *Hermanos y Compania*, 209 U. S. 337.

Congress has reenacted in the Revenue Act of 1921 a capital stock tax based upon the "fair average value of the capital stock," and under the principle of these cases it must follow that it has adopted the construction consistently placed upon this language by the Commissioner of Internal Revenue. Therefore if plaintiff should make the same claim under the 1921 Act that it is now making under the 1918 Act it must inevitably be defeated, since the intention of Congress can no longer be doubted. No better evidence could be found that, by the use of these words in the Revenue Acts of 1916 and 1918, Congress did not intend anything different.

IV

The context of the provision shows that Congress has used as the measure of the tax the property of the corporation and not the property of its shareholders.

(*a*) *"Its capital stock"*

Having already noted that in previous acts Congress has used as the measure of the tax the property of the corporation and not of its shareholders, it will be seen in enacting the Revenue Act of 1918 Congress did not intend to change the measure to

the property of a person not being taxed. The distinction between the two kinds of capital stock, referred to hereinabove, should be carefully borne in mind. If there are two kinds of property, logically both the corporation and the stockholder may be taxed. Where, for example, the capital stock of a bank is exempted from taxation, nevertheless the property of the stockholders in shares of stock may be taxed. (*Albany City National Bank* v. *Maher,* 6 Fed. 417.) Since good will, franchises, and the like, *although intangible, are valuable assets,* a property tax on the "capital stock" of corporations has been in the favored means used by States to reach this kind of property. In such cases, that which is sought to be reached is the *property of the corporation,* and the term "capital stock," used in statutes of this character, refers to the capital stock in the hands of the corporation and *not* to the proprietary interest in shares of stock. Thus we see that "capital stock" in this sense refers to *all* property of the corporation—both tangible and intangible. In such cases it is customary for the statute to impose a tax on the value of the capital stock (*including* franchises, good will, and intangibles) over and above, or in excess of, the assessed value of real estate and tangibles. (See *Chicago Union Traction Co.* v. *State Board of Equalization,* 112 Fed. 607.) Thus, where a statute sought ostensibly to tax a national bank on "*shares of stock*" in the hands of its share-

holders, and it appeared that what was really sought to be reached was the property of the bank, it was held that the tax was on the bank's interest in *its* capital stock and not in fact on the shares of stock in the hands of shareholders. (*Home Savings Bank* v. *Des Moines*, 205 U. S. 503.)

(b) "Estimating"

Congress used the words "in estimating the value of capital stock and disclosing an intention that all factors and elements should be considered in estimating the *fair average value.*" This point is illustrated by the language used by this court in referring to a taxing statute of Michigan. Mr. Justice Brewer, speaking for the court, said (*Powers* v. *Detroit & Grand Haven Ry. Co.*, 201 U. S. 543, 561):

> Again, the tax is to "be estimated upon the last annual report of the * * * corporation." While such report might be expected to include not merely the property belonging to the corporation but also the number and names of the stockholders and the number of shares held by each, and possibly also the amount paid in by each, yet the word "estimated" carries with it the idea of valuation rather than of mathematical apportionment. It suggests that the property reported by the corporation is to be the basis upon which the assessors shall make their valuation, so that the tax is "estimated" upon that property rather than

> fixed by the mere process of multiplication or division. * * * Under those circumstances we are of opinion that the tax provided for by section 9 is a tax upon the property of the corporation and not a tax upon the shares of stock held by the shareholders.

(c) "Surplus and undivided profits shall be included"

In estimating the value of capital stock, "surplus and undivided profits *shall be included.*" In other words, Congress has in effect said that the value of the privilege of doing business and the measure of the tax is the value of tools, assets, franchise, good will, etc.—the capital stock—which is employed in doing business—the potential value of privilege, not the gain derived from the privilege. Why include "surplus and undivided profits" if we are concerned only in the earnings and not in the value of that with which the corporation has to do business. Under section 3 of the Act of October 22, 1914, the value of the privilege of doing a banking business was the amount of capital employed or used in the business irrespective of whether the business was profitable or otherwise. The present capital stock tax laws exhibit no intent to use a lesser measure. There is nothing in the capital stock tax acts which infers that only profitable businesses are to pay the tax. If the privilege of doing business is not worth the net assets of the corporation, either for present or future gain, why keep the corporation alive—why not liquidate?

By liquidating, a value equivalent to the liquidating value of the net assets may be gotten out of the stock.

(d) "Fair average value"

The Revenue Act of 1918 was enacted February 24, 1919, and made no substantial change from the language of the Revenue Act of 1916. The new law imposed the tax on "*every* domestic corporation," omitting the words "having a capital stock represented by shares." It also added the word "average" to "fair value," making the new law read "fair average value of its capital stock." There was no change in the basis of the tax.

> On amendment No. 488: The House bill imposed upon a domestic corporation an annual excise tax equivalent to $1 for each $1,000 of so much of the fair average value of its capital stock for the preceding year as is in excess of $5,000. It also provided that in estimating the value of the capital stock the surplus and undivided profits should be included. ***This is the basis of the tax under the present*** (1916) ***law,*** with the rate increased 100 per cent. The Senate amendment changes the basis of the tax from the fair average value of the capital stock to the amount of the net assets shown on the books as of the close of the preceding income-tax year; and the Senate recedes. (Conference Report No. 1037, to accompany H. R. 12863, p. 84; 65th Cong., 3d sess.)

It is plainly to be seen from the foregoing that whatever Congress intended by the words " fair

value " and " fair average value of the capital stock " it did *not* intend the *par value* of the stock, nor the book value of the *tangible assets,* nor the amount of capital subscribed and paid in, nor the amount of capital stock liability charged upon its books, nor anything else which is *fixed and determined.* The history of the legislation shows that Congress was insistent upon arriving at a standard of measurement which would be broad and comprehensive enough to cover any and all factors or elements which might enter into the valuation of the *privilege to the corporation* in carrying on or doing business in a corporate capacity. Thus Congress was intending to estimate the *potential value* of such a privilege to the corporation—*rather than the actual use made of its privilege by the corporation in so carrying on its business.* The word "fair " shows that Congress did not have in mind any particular method of value, like the corporate balance sheet, or sales on the market of a comparatively small per cent of the shares of stock, but intended a valuation in which the several factors would be taken into consideration in arriving at an equitable result. The word " average " shows that it did not intend something fixed and determined like par value of stock, book value of assets, or liquidating value, but had in mind the value of the corporate business as a going concern, which must naturally fluctuate, and which would therefore be subject to estimation, appraisal, or average.

(*e*) *Provisions of the Revenue Act of 1918 as to foreign corporations*

Section 1000 (a) (2) of Title X of the Revenue Act of 1918 provides:

> Every foreign corporation shall pay annually a special excise tax with respect to carrying on or doing business in the United States, equivalent to $1 for each $1,000 of the *average amount of capital employed in the transaction of its business* in the United States during the preceding year ending June thirtieth. [Italics ours.]

The Senate amendment provided with respect to domestic corporations that the valuation should be the book value of the assets at the close of the preceding year, yet used the phrase "capital employed" with reference to foreign corporations. In its final form as enacted the Senate standard as to domestic corporations was rejected but the measure as to foreign corporations was accepted.

(*f*) *The measure adopted for mutual insurance companies*

That Congress could not have meant shares of stock when it said "capital stock" is further evidenced by the context of the Revenue Act of 1916, which used the same phrase. Section 407 states the persons liable for the tax as follows (39 Stat. 789):

> Every corporation, joint stock company or association * * * having a capital stock

represented by shares, *and every insurance company* * * *, etc.

Then follows the measure of the tax, based on "the fair value of its capital stock."

It is obvious that under the phrase "every insurance company" must be included the mutual companies, which have no shares of stock. Yet the measure is the same for them as for corporations "having a capital stock represented by shares"—that is, "the fair value of its capital stock." Since Congress used the same measure for two kinds of corporations, one having shares of stock, the other having none, it must be certain that Congress did not intend share valuation as the exclusive measure.

V

The history of federal capital stock taxes and the context of the Act of 1918 show that Congress intended to include all factors of value.

The appellant takes the position that it is the *shares* of stock and *not* the assets which are to be valued as a measure of the tax, and it further insists that where there are sales of such shares on the market that such sales should be conclusive and form the basis of the measure of the tax.

We have attempted in this brief to show that the statute has no such narrow meaning; that in the first place it is not the shares of stock which are to be valued, since that is a property entirely distinct and apart from the property of the corporation. Again we have called attention to the language of

the statute showing that it is the *capital stock of the corporation*—" the fair average value of *its* capital stock " which is under consideration, and that since the stockholders are not taxed their shares are not the measure.

We have attempted to show—and we believe we have demonstrated—that Congress intended to reach a fair valuation of the privilege of doing business, and in measuring the tax by the capital stock of the corporation it was meant that the valuation so placed on the capital stock should reflect in every possible way the value of this privilege of doing business.

We do not deem it necessary to argue at any length to this court that there are numberless influences which affect the market price of stocks and which bear absolutely no relation to the real value of the privilege enjoyed by the corporation in carrying on its business. It is readily conceivable that a conservative concern which turns its earnings back into the business in the purchase of valuable properties—or properties which may become valuable in the future pursuit of its business—and pays no dividends (or negligible ones), may see its stock go to a very low level because the investing public is not interested, as a rule, in the purchase of nondividend bearing stock. And yet, although its stock may be selling at a nominal figure in the market, the company may be earning tremendous amounts—the result of which will at a

future date be apparent. Now it is fallacious to say that the privilege enjoyed by the corporation, in thus doing its business and amassing great properties for future earnings, is to be measured by the nominal sales of its stock. Without doubt the court will recall numerous instances of such situations. And again, the results of propaganda, or the activities of persons of bearish or bullish tendencies may (and do) have a powerful influence in holding down or pushing up the market when it suits the ends of those behind such endeavors. It is well known that the heavy selling of a stock will often have a pronounced tendency to drive the market down—and yet the inherent value of the corporation's "capital stock," in the sense we have shown it to be intended, is not in the least affected thereby. Take a corporation which is conservatively building for the future, and with great schemes of operation under way which absorb all of its present earnings—the privilege such a corporation enjoys is as great as, and perhaps greater than, the privilege enjoyed by another and less conservative concern which distributes its earnings in dividends as fast as they are earned and thus forces the price of stock to a high level on the market, and operates purely upon the expectancy of good business conditions. This second corporation could not be said to have a capital stock as valuable on a fair estimation of value as a whole as the one first above mentioned, in spite of the fact that the sales of its stock would indicate

and, according to plaintiff's contention, *would prove conclusively* that it was the more valuable of the two. We do not believe it is necessary to pursue this line of reasoning further, for the case is a patent one that such a criterion would be an absurd one as well as unconscionable.

Acting upon the intention of Congress as disclosed by the Congressional Record, the authority of the courts, State and Federal, in construing similar statutes, and the considerations outlined above, the Commissioner of Internal Revenue in enforcing the provisions of the Act in question has adopted the view that "fair value of the capital stock" meant neither par value of stock outstanding nor book value of assets over and above liabilities, *but the value of the corporate business as a going concern,* the value of all the property of the corporation, tangible and intangible, its franchises, its business opportunities, capacities, and prospects viewed as an entirety. By "fair average value" the Commissioner has ruled that Congress intended that several factors, besides book value, should be taken into consideration, and that such corporation should receive individual treatment, and that no hard and fast test of "fair average value," applicable to all companies without discrimination, should be adopted.

VI

The burden is on the taxpayer to establish by a preponderance of the evidence all the facts necessary to show that it does not owe to the Government the tax which it is seeking to recover by this action.

The appellant contends that the proper method of determining the tax is by a valuation disclosed by sales of share stock on the market. If it were to be admitted that such a method is a proper one, the claimant is not entitled to a verdict. The burden is upon it to prove by a preponderance of the evidence (1) that the method used by the Commissioner of Internal Revenue is entirely erroneous and improper and fundamentally wrong; (2) that the method contended for by it is the fundamentally proper method to the exclusion of any method used by the commissioner.

The Commissioner of Internal Revenue in making assessment of taxes acts in a quasi-judicial capacity, and his findings as to valuation are not judicially reexaminable unless resulting from some principle of assessment which is *fundamentally* wrong. When a discretionary authority is conferred upon a public officer, and he is made judge of the facts, his decision in the absence of any qualifying or controlling statutory restrictions upon the effect of his decision is conclusive. (*Allen* v. *Blunt,* Fed. Cas. 217.)

In *Louisville & Nashville R. R. Co.* v. *Greene,* 244 U. S. 522, 536, this court said:

> The findings of an official body such as the board of valuation and assessment, made * * * after a hearing and upon notice to the taxpayer, are *quasi* judicial in their character, and are not to be set aside or disregarded by the courts unless it is made to appear that the body proceeded upon an erroneous principle or adopted an improper mode of estimating the value of the franchise, or unless fraud appears.

At the same term and in a similar case the court said that in the absence of fraud the valuations made by an assessing board are not judicially reexaminable unless resulting from some principle of assessment which is *fundamentally* wrong; *Illinois Central R. R. Co.* v. *Greene,* 244 U. S. 555, 562.

To the same effect are: *Park Falls Lumber Co.* v. *Burlingame,* 1 F. (2d) 855, where the rule was recognized in a case involving the section of the Act of 1918 which is involved in the instant case; and *Dugan* v. *United States,* 34 Ct. of Claims, 458, 466; *Anderson* v. *Farmers' Loan & Trust Co.,* 241 Fed. 322, 329; *Germantown Tr. Co.* v. *Lederer,* 263 Fed. 672, 676; *New York Life Insurance Co.* v. *Anderson,* 263 Fed. 527; *Schmitt* v. *Trowbridge,* Fed. Cas. 12468.

Where the validity of an assessment is attacked, it has been universally held that when the determination of the amount of the tax due is made by

the Commissioner of Internal Revenue, such determination is *prima facie* valid and the person who attacks it has the whole burden of proving *that such tax is not due.* In the instant case this would necessitate proof on the part of the plaintiff that not only is the method contended for by it a correct method, but must also show that it is the only correct method or that the method adopted for the valuation by the commissioner is based upon a principle which is not only erroneous but fundamentally wrong.

The leading case on this subject is that of *United States* v. *Rindskopf,* 105 U. S. 418. In that case this court sustained a portion of the charge of the lower court to the jury as follows (p. 420):

> When, therefore, an assessment has been made by this officer, it is to be presumed, until such presumption is overcome by proof to the contrary, that it was made upon sufficient evidence, and it is not necessary that the evidence upon which the commissioner acted should be laid before the jury.

The *Rindskopf case* was followed by the Circuit Court of Appeals for the Eighth Circuit in the case of *Western Express Co.* v. *United States,* 141 Fed. 28. There the court said (p. 30):

> The controlling question, therefore, for decision is whether or not there was any evidence in the case to support the finding. If there was, the verdict must stand. The action being based upon assessments made by the proper revenue officers of the Govern-

> ment, the law presumes that these officers proceeded regularly; that on due inquiry they ascertained the existence of the essential facts subjecting the defendant to such tax. In this respect such officers act in a quasi-judicial capacity, and their action stands as prima facie correct until this presumption, by countervailing proof, is met and overthrown by the party assessed.

To the same effect is the decision in *United States* v. *Cole,* 134 Fed. 697, 700, where the Circuit Court for the Middle District of Tennessee said:

> * * * Furthermore, I may repeat and restate that the burden is not on the Government in the first instance to go behind the assessment made and certified, and to show either directly or circumstantially the actual production of spirits in order to uphold the assessment. As I have pointed out, the assessment is prima facie valid, and sufficient to support judgment for the Government unless the defendant *is able to show its invalidity.* [Italics ours.]

This statement of the court supports our proposition made above, that it is necessary that plaintiff prove the *invalidity of the assessment* in the instant case, and that a mere showing of the correctness of his own method is not sufficient to support its action. This is further borne out by *Germantown Trust Co.* v. *Lederer,* 263 Fed. 672, 676:

> The decision of an assessor must stand until it can be affirmatively controverted.

> One attacking his assessment *has the burden of showing it is unlawful.* [Italics ours.]

Mr. Justice Hunt, in *Arthur* v. *Unkart,* 96 U. S. 118, at page 122, said:

> These officers are, however, selected by law for the express purpose of deciding these questions; they are appointed and required to pronounce a judgment in each case; and the conduct, management, and operation of the revenue system seem to require that their decisions should carry with them the presumption of correctness. This rule is not only wise and prudent, but it is in accordance with the general principles of law that an officer acting in the discharge of his duty, upon the subject over which jurisdiction is given him, is presumed to have acted rightly.

In the case of *Canal & Banking Co.* v. *New Orleans,* 99 U. S. 97, 99, the court said:

> In this suit the burden of proof is on the bank to show *that it has been unlawfully taxed.* [Italics ours.]

The cases to this effect could be multiplied without adding to the force of the well-settled doctrine. Attention, however, is called to *Schafer* v. *Craft,* 144 Fed. 907; *Schmitt* v. *Trowbridge,* Fed. Cas. 12,468; *Malley* v. *Walter Baker & Co.,* 281 Fed. 41; *Dodge* v. *Osborn,* 240 U. S. 118; *Clinkenbeard* v. *United States,* 21 Wall. 65.

VII

Conclusion

In measuring the tax by the fair average value of the capital stock all factors which enter into the value of the privilege taxed may be considered. The Government is not confined, in this determination, to the market value of the share stock as an indication of such value. The Exhibits A, B, and C on the tax returns are all for the benefit of the commissioner in helping him to arrive at a proper estimate. No one of them is necessarily controlling. In his quasi-judicial capacity the commissioner is the judge of the probative values to be given to each. This is within his prerogative and can not be attacked except for fraud or by a showing that the assessment is illegal and unlawful upon principle. Therefore, unless the appellant can prove that the assessment is illegal, unlawful, and based upon an erroneous principle which is in itself fundamentally wrong, it will not avail him to prove that a correct way to value the capital stock of a corporation is by averaging the market sales of its share stock held by individual shareholders. To prove this would only be to prove what the Government already admits, to wit, that under some circumstances such a method might be proper. But the Government does not admit that it is the only method that is correct. It is simply an element or factor to be taken into consideration together

with other elements and factors in determining, by elimination, the fair average value of the company's privilege of doing business in a corporate capacity measured by *its* capital stock.

The case of *Central Union Trust Company of New York* v. *Edwards,* 287 Fed. 324 is conclusively against the method of valuation contended for by the appellant in this case and controls this case. The appeal should be dismissed.

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Solicitor General.

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FRED K. DYAR,
Special Assistants to the Attorney General.

JANUARY, 1925.

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RAY CONSOLIDATED COPPER COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 443. Argued January 13, 1925.—Decided May 25, 1925.

1. The term "capital stock" has no fixed meaning in taxing statutes, and must be interpreted in each case by reference to the context, the nature, purpose and history of the statute, and by other aids to construction. P. 376.
2. The Revenue Act of 1918 provides: "Every domestic corporation shall pay annually a special excise tax with respect to carrying on or doing business, equivalent to $1 for each $1000 of so much of the fair average value of its capital stock for the preceding year ending June 30 as is in excess of $5000. In estimating the value

of the capital stock the surplus and undivided profits shall be included." *Held:*

(*a*) That "capital stock" here means the entire potentiality of the corporation to profit by the exercise of its corporate franchise; and the method for ascertaining the value, not being prescribed, is left to the sound discretion of the Commissioner of Internal Revenue subject only to the obligation to consider every relevant fact. P. 377.

(*b*) The net fair value of the corporate assets is clearly relevant; and adoption of this, rather than the value of the outstanding shares of stock as evinced by the average prices at which the shares were sold on the stock exchange, was not arbitrary nor an abuse of discretion. *Id.*

59 Ct. Cls. 686, affirmed.

APPEAL from a judgment of the Court of Claims denying a claim for recovery of the amount of an additional special corporation excise tax, paid under protest.

Mr. Arthur A. Ballantine, with whom *Messrs. Carroll A. Wilson* and *George E. Cleary* were on the brief, for appellant.

The Solicitor General, with whom *Messrs. Robert P. Reeder* and *Fred K. Dyar*, Special Assistants to the Attorney General, were on the brief, for the United States.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

The Revenue Act of 1918, February 24, 1919, c. 18, Title X, § 1000 (a) (1), 40 Stat. 1057, 1126, provides: "Every domestic corporation shall pay annually a special excise tax with respect to carrying on or doing business, equivalent to $1 for each $1000 of so much of the fair average value of its capital stock for the preceding year ending June 30 as is in excess of $5,000. In estimating the value of the capital stock the surplus and undivided

profits shall be included." How the value shall be determined is the main question for decision.

Ray Consolidated Copper Company, a domestic corporation engaged in the business of mining and smelting, has a capital stock of $15,771,790, divided into 1,577,179 shares of common stock of the par value of $10 each. Under the above provision, the company filed, on July 30, 1920, with the appropriate collector of internal revenue a return for the special tax for the year ending June 30, 1921, in which it reported that the fair average value of its capital stock for the preceding year was $34,803,608.99. The value so reported was arrived at by finding the average selling price of the stock on the New York Stock Exchange during the calendar year 1919 and multiplying the price so found—about $22 a share—by the number of shares outstanding. The stock is listed on the New York Stock Exchange; was traded in almost daily; and the aggregate number of shares so sold during the year equalled nearly one-third of the total stock outstanding. The Commissioner of Internal Revenue refused to accept the company's valuation; took into consideration for the purpose of estimating the value of the capital stock, among other things, the value of the mining property theretofore established in connection with other federal taxes; concluded that the fair value of the capital stock considered as a whole was not materially less than the net fair value of the assets; fixed the value of the capital stock higher than the company had reported; and exacted an additional tax. Refund being denied, this suit was brought in the Court of Claims to recover the additional amount paid. Before the trial the Commissioner refunded a part of the additional tax. As to the balance, that court upheld the assessment. 59 Ct. Cl. 686. The case is here on appeal under § 242 of the Judicial Code.

The Company insists that the term "fair average value of its capital stock" means fair average value of the ag-

gregate shares of its stock and not the value of the corporate assets; that the fair average value of the shares, based upon *bona fide* sales of the stock in reasonable volume, was correctly stated in its return; that the aggregate value of the shares so determined by the fair average selling price of the individual shares must be adopted as the single standard for determining the value of the capital stock; that such determination cannot lawfully be modified by any consideration of the value of the corporation's assets; that the Commissioner based his determination upon the net fair value of the assets; and that the additional tax was, therefore, illegally assessed.

The tax is a special excise imposed on the privilege of carrying on business in the form of a corporation. Congress might have measured the value of the privilege by the net income of the year, as in the corporation tax, *Flint* v. *Stone-Tracy Co.*, 220 U. S. 108, 174; by the annual gross receipts, as in the sugar refiners' tax, *Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S. 397; by the amount of capital employed, as in the bankers' tax, *Fidelity Title & Trust Co.* v. *United States*, 259 U. S. 304, 308; or by the fixed capitalization, as in the taxing acts of many states. It might have taken as the measure, the aggregate value of all of the outstanding shares of stock and have directed that their value be computed by multiplying the average selling price, during the year, of a single share by the total number of shares outstanding. Compare *The Delaware Railroad Tax*, 18 Wall. 206, 209, 231. But Congress did none of these things. It declared that the tax should be measured by the "fair average value of its [the corporation's] capital stock." In so doing, it used a term which has no fixed meaning in taxing statutes and it gave no directions for ascertaining such value, except that in "estimating" value "the surplus and undivided profits shall be included."

As the term capital stock has no fixed significance, it must be construed in a particular statute by reference to

the context, the nature and purpose of the statute, its history and other aids to construction. We think that, as here used, it means the entire potentiality of the corporation to profit by the exercise of its corporate franchise. *Central Union Trust Co.* v. *Edwards,* 287 Fed. 324, 328. As the method to be pursued in ascertaining the value is not prescribed, we think that it was left to the sound judgment and discretion of the Commissioner, subject only to the obligation to take into consideration every relevant fact. Compare *Louisville & Nashville R. R. Co.* v. *Greene,* 244 U. S. 522, 540.

The capital stock of a corporation, its net assets, and its shares of stock are entirely different things. Compare *Farrington* v. *Tennessee,* 95 U. S. 679, 686; *Tennessee* v. *Whitworth,* 117 U. S. 129, 136–137; *Wright* v. *Georgia R. R. & Banking Co.,* 216 U. S. 420, 425; *Des Moines National Bank* v. *Fairweather,* 263 U. S. 103, 111. The value of one bears no fixed or necessary relation to the value of the other. The net fair value of the assets was clearly a relevant fact bearing upon the value of the capital stock. It does not appear that the Commissioner refused to consider the selling price of the shares or other factors. He may have given much consideration to the selling price of the shares, and have concluded that, under the conditions prevailing in the year 1920, the average price at which relatively small lots were sold on the Stock Exchange was not a fair indication of the value of the capital stock. We cannot say that he acted arbitrarily or abused his discretion in concluding that " the fair value of the capital stock considered as a whole is not materially less than the net fair value of the assets." *Illinois Central R. R. Co.* v. *Greene,* 244 U. S. 555, 562. In *Hecht* v. *Malley,* 265 U. S. 144, 162–3, where the provision here in question was upheld as applied to a voluntary association without a fixed or designated share capital, the Collector had assessed the tax by " taking the

fair value of the assets of the Association over its liabilities, and calling the difference its capital stock."

Affirmed.

MR. JUSTICE SUTHERLAND dissents.